90-587

No. _____

In The

Supreme Court of the United States

October Term, 1990

THE CONE CORPORATION, et al.,

Petitioners,

v.

HILLSBOROUGH COUNTY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. a. Has a county demonstrated a "compelling interest" sufficient to implement a race-conscious program in the *construction* industry when it relies only on a "disparity" in *overall public expenditures* (purportedly demonstrated by a use of some limited statistics which lack foundation) and on unsubstantiated and undocumented complaints of discrimination?

   b. Is "strict judicial scrutiny" properly applied, as required by *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), when a Court permits a county to implement a race-conscious program based only on such evidence?

2. Can *any* race-conscious program survive properly applied "strict judicial scrutiny" when (a) the "effect" of discrimination sought to be eliminated is a statistical "disparity"; and (b) the program's avowed purpose is *not* to eliminate any identified discriminatory practices but, rather, to eliminate the "disparities" – to insure that a "fair share" of county expenditures goes to members of certain "minority" groups?

3. Has a governmental entity properly identified (in accordance with the standards set forth in *Wards Cove Packing Company, Inc. v. Frank Atonio*, 109 S.Ct. 2115 (1989)) discriminatory practices and patterns which it then may remedy with a race-conscious program, when all it relies on is the evidence cited in question 1, above?

4. Does this Court's decision in *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997 (1990), have any application to governmental decisions to use racial classifications in the field of public construction contracting?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. May a county implement an industry-wide race-conscious program in construction contracting when it has never attempted to implement and enforce a race-neutral prohibition against discrimination in the industry or to take more narrowly tailored action against those entities identified as engaging in discriminatory practices?

6. May a county continue to enforce a race-conscious program in public construction contracting after its self-defined goal of "parity" has been achieved?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	The Cone Corporation; J.W. Conner & Sons, Inc.; Cone Constructors, Inc.; Dallas 1 Construction & Development, Inc.; Bulger Contracting Co.; Boyce Company; S&E Contractors, Inc.; Woodruff & Sons, Inc.; and Suncoast Utility Contractors Ass'n
Respondents:	Hillsborough County, Florida; and Mr. Larry J. Brown

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The opinions of the district court are reported at 723 F.Supp. 669 (M.D.Fla., 1989) and 730 F.Supp. 1568 (M.D.Fla., 1990). The Court of Appeals decision is reported at 908 F.2d 908 and is reprinted in the Appendix to this petition.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on August 13, 1990, and this petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RESOLUTIONS INVOLVED

a. Amendment XIV, Constitution of the United States

Section 1. Citizens of the United States.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

b. 42 U.S.C. §2000d. Nondiscrimination in federally assisted programs

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

c. 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

d. Hillsborough County Resolution No. R88-0173 (reproduced in the Appendix)

STATEMENT OF THE CASE

Hillsborough County, Florida, like most jurisdictions in the South, has a history of segregation and discrimination, *de jure* and *de facto*. These practices have permeated society and have affected every area of daily life and development. In its attempts to deal with the legacy of segregation, Hillsborough County has enacted an anti-discrimination ordinance with regard to public accommodations, employment and real estate sales, but it has

not done so with regard to public procurement or construction contracting.[1]

In the field of construction, the County (in 1978) initiated a "voluntary" program under which non-minority prime contractors were to be encouraged to increase their use of minority and female businesses in their construction contracts.[2] This program was never funded, implemented or enforced.[3]

At the time the 1978 program was proposed, "Hillsborough County had no direct information about minority participation in public contracting . . . ".[4] The County then began to compile information regarding MBE participation in the County to demonstrate "[t]hat minority businesses were seriously under-represented among recipients of county contract dollars . . . ".[5]

Notably, a study of the City of Tampa (which makes up a large part of Hillsborough County) financed by the U.S. Department of Labor in 1981,[6] found no discrimination which affected minority or female businesses in the construction industry. The study found that minority and

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[1] *See, e.g.*, Bing deposition, p. 21, 11. 5 – 10; Gilder deposition, p. 35, 1. 15-p. 37, 1. 21.

[2] Defendant's Exhibits 5 and 6.

[3] Plaintiffs' Ex. 3, p. 1, and Plaintiffs' Ex. 6, p. 2

[4] Respondents' Appeal Brief, p. 5.

[5] Respondents' Appeal Brief, p. 8. Despite this assertion, respondents' statistics and evidence never determined what the size or capacity of the minority-owned construction businesses was at that time or at any other time.

[6] Defendants' Ex. 11, pp. 5-6.

female enterprises within Tampa had had difficulties which were attributable to " . . . the lack of access to capital . . . , inability to obtain adequate surety bonding, [lack] of capable managers and adequate training programs".[7] Nowhere in the report was there any implication that forces other than those mentioned were the cause of any disparity or difficulty. After 1981, information was collected concerning the number (but not the size or capacity) of minority firms in the construction industry.[8]

In 1984, the County implemented its first mandatory MBE program.[9] The enactment followed Board of County Commissioners' meetings and discussions. At the Board meeting in which the resolution authorizing this program was passed, there was a discussion regarding the desired objectives of this program. In particular, Commissioner Platt questioned the arbitrariness of the goals set for each specific minority group, stating that there was no factual basis for the " . . . 8% Black, 5% Hispanic, 2% other, 5% women . . . " parameters/benchmarks which were to be implemented by the program.[10] Commissioner Platt further elaborated her concerns by stating that, without a record evidencing discrimination, a program using such arbitrary goals is " . . . contrary to the concept of equal protection under the law."[11]

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[7] *Ibid.*

[8] Defendant's Ex. 28.

[9] Resolution R84-0103; see Plaintiffs' Ex. 21.

[10] Plaintiffs' Ex. 21 at p. 753.

[11] *Ibid.*

Although lip service was paid to the goal of remedying some undefined past discrimination in the construction industry, there was and is no evidence that such discrimination existed. Still, the Board enacted measures which required prime contractors to satisfy specific race-conscious goals. Thus, the entire program was created for an improper purpose (*i.e.*, racial balancing) and was created, implemented, and enforced using arbitrary goals.

The program has been re-enacted periodically since 1984 without significant change and culminated in the passage of R88-0173 which is challenged in this litigation. The current overall MBE program "goal" is 25% "minority" participation, broken down as follows:

MBE (nondisadvantaged)	5%
Black	10%
Hispanic	7%
Women	2%
Other	1%

Plaintiffs' Ex. 1 at para. 10.

Although the "overall", annual, aspirational "goal" is segregated by category, the "goal" established administratively on County projects may be met by the use of *any* minority-owned contractors, including *non*-disadvantaged minority members.[12]

After suit was brought by these non-minority contractor-petitioners, the district court gave the parties ample opportunity for discovery and, after a full consideration of the evidence submitted by the parties, concluded that the County's program did not meet the

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[12] Plaintiffs' Ex. 2.

standards required by *Croson*. The County had not demonstrated any "compelling interest" in implementing a race-conscious program nor had it narrowly tailored its program to remedy any particular, identified discrimination. The district court granted a preliminary injunction. When the defendants could produce no further evidence in response to plaintiffs' motion for summary judgment, the court granted that motion, as well.

The Court of Appeals reviewed that same evidence (summarized at 908 F.2d at 914-915) and concluded that what had been presented was sufficient to withstand summary judgment and was sufficient to uphold the program's constitutionality. It remanded the case for trial.[13]

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[13] The procedural posture of this case should not be a bar to the granting of *certiorari*. To the contrary, it is precisely that posture which makes review by this Court important and desirable.

First, if such a limited showing by a governmental entity is sufficient to withstand summary judgment, the costs of challenging patently unconstitutional racial consciousness will be escalated significantly (thus deterring challenges to such conduct).

Second, if the evidence cited by the Court of Appeals is sufficient to withstand summary judgment, it is, *a fortiori*, sufficient to sustain the County's defense of its program if accepted and believed by the fact-finder at trial. This quantum of evidence is so far below what is properly required as to warrant review by this Court at this time so as to set the proper evidentiary standard in cases of this nature.

ARGUMENT – REASONS FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals failed properly to apply "strict scrutiny"

The Court of Appeals, while articulating the proper standard of review, 908 F.2d at 913-914, interpreted this Court's holding in *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), very narrowly.[14] In reversing the grant of summary judgment and permitting continuation of Hillsborough County's MBE program, it reviewed the sparse supporting evidence and applied the law in such a way as to render nugatory the constitutional requirement that a use of suspect classifications must be subjected to searching judicial scrutiny to insure that they are used only when nothing else will suffice to achieve a constitutionally permissible purpose.

This is the first decision of a Court of Appeals which purports to apply the principles enunciated in *Croson* to a specific program and it deviates so far from the rationale

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[14] Indeed, the Court of Appeals' analysis practically limits *Croson* to its facts. *See, e.g.*:

> After comparing the County law with the outer perimeter established in *Croson*, we conclude that the County law falls within that perimeter and thus is constitutionally valid.
>
> 908 F.2d at 913

> Under the County law, a contractor never faces the *Croson* situation, where in order to fill a rigid quota he or she is required to hire MBEs for a job that no MBEs are available, willing, or qualified to do.
>
> 908 F.2d at 917

and reasoning of *Croson* as to warrant review and reversal by this Court. Certiorari should be granted so that this deviant application of "strict scrutiny" will not stand as the binding precedent for the district courts of the Eleventh Circuit[15] or as persuasive authority for other Courts of Appeal.[16]

The Court of Appeals in this case held – while purporting to apply "strict judicial scrutiny" – that the following evidence (which constitutes the substance of all that the County could present) would, in and of itself, be sufficient to give the County a "compelling interest" in implementing a race-conscious program in the construction industry:

> "(1) An analysis of statistical data on minority businesses, . . . over a three-year period, indicated that minorities . . . were significantly underrepresented in such awards.
>
> "(2) According to data collected in 1983, . . . MBE contractors comprised twelve percent of the total contractor population of Hillsborough County.
>
> "(3) Between October 31, 1982 and July 31, 1983, 7.89% of the purchase orders awarded by the County were awarded to minorities. Of County dollars spent for purchases, 1.22% of the total County dollars expended went to minorities.
>
> "(4) Between July 12 and July 30, 1982, 6.3% of the total bids awarded by the County were

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[15] There are currently pending within the Eleventh Circuit challenges to at least six other MBE programs.

[16] There are more than 15 challenges to various MBE programs pending in courts outside the Eleventh Circuit.

awarded to minorities. Approximately 6.5% of the average dollar amount of the bids was awarded to minorities.[]

"(5) At least three people received a number of complaints alleging discrimination in County construction and procurement."

908 F.2d at 914-915

This is *not* evidence of the quality or quantity required by *Croson* and is clearly insufficient to demonstrate the necessary "compelling interest". The figures cited in the first, third and fourth points (contracts awarded to and monies spent with minority-owned businesses) relate *not* to construction contracting – the field in which the "remedy" was implemented – but to County procurement in general.[17] The second point (a proportion derived from gross number of businesses) may be of some interest, but it has little or no significance without consideration of the relative sizes of the businesses being considered.[18] The fifth point (unsubstantiated and undefined complaints) gives no guidance as to the particular practices alleged to be discriminatory and, thus, cannot serve as a predicate for demonstrating a "compelling interest" or for fashioning a "narrowly tailored" remedy designed to address any perceived problem.

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[17] See Defendants' Exhibits 35, 15 and 22. Moreover, the County presented no proper foundation for the statistics offered and no evidence as to the statistical significance of any apparent "disparity".

[18] It would seem to be self-evident that a construction contractor with 100 employees and millions of dollars worth of equipment cannot be treated as the statistical equivalent of an entrepreneur operating from his home with one pickup truck and a toolbox.

Certiorari should be granted to re-emphasize and define the depth and scope of the inquiry courts should undertake when engaging in "strict scrutiny". If this decision by the Court of Appeals, upholding an MBE program with such a paucity of evidence, is a proper application of "strict scrutiny" by the judiciary then there are few, if any, race-conscious programs in public contracting which will fail to pass constitutional muster.

If this Court denies review, it appears from the Court of Appeals' opinion that at trial the plaintiffs may be required to bear the burden of proving that the statistics relied upon are *not* valid indicators of the existence of discrimination, that the complaints were *not* justified, that minority-owned construction businesses do *not* account for the claimed percentage of capacity in the industry and that there *are* race-neutral and more narrowly-tailored alternatives available. This would be a dramatic reversal of the placement of the burden of proof in cases such as this.

Heretofore, when the use of "suspect" classifications was challenged, it was the governmental entity which bore the burden of proving that it *did* have a "compelling interest" in using the classification and that the remedy *was* the most narrowly tailored possible. *See, e.g., In re Griffiths*, 413 U.S. 717, 721-722 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

Certiorari should be granted to re-emphasize that, under "strict scrutiny", it is the governmental entity instituting a race-conscious plan which bears the burden of justifying its necessity.

2. The Court of Appeals accepted racial balancing as a proper legislative purpose

The evidence is both pervasive and conclusive – in fact, it is uncontroverted – that the reason this program was instituted was *not* because there was any particular discriminatory practice which was identified in the construction industry, but because there was a statistical "disparity" in public expenditures – it was believed that minority-owned businesses in Hillsborough County were not "getting a fair share" of public dollars.[19]

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[19] See, *e.g.*:

Pl.Ex.4: " . . . to *eliminate any imbalance* that may exist by establishing goals and to obtain same."

" . . . minority vendors and contractors do not receive *an equitable amount* of the county's purchasing . . . "

Pl.Ex.6, p. 2:

" . . . Hillsborough County should aggressively implement its policy . . . *for more equitable minority participation* . . . "

Pl.Ex.7: " . . . Black and other minority vendors and contractors do not *receive an equitable amount* . . . "

Pl.Ex.8: " . . . establish a policy . . . *to eliminate any imbalance* that may exist by establishing goals . . . "

Pl.Ex.11, p. 1:

" . . . a priority exists for expanding opportunities for minorities (especially those who fall within the definition of socially or economically depressed) to *obtain an equitable share* of the County's business."

" . . . these efforts have not resulted in the *equitable distribution* of such bids and contracts. . . . [T]he

(Continued on following page)

Instead of examining the evidence and rejecting the transparent attempt by the County to allocate expenditures along racial lines, the Court of Appeals unquestioningly

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percentage of distribution falls far short of the percentage of minorities in the total population of Hillsborough County."

p. 2:

" . . . the establishing of *a program of equitable distribution* be based on the percentage of minorities constituting the minority population of Hillsborough County."

Pl.Ex.12: " . . . minorities are *not receiving an equitable share* of County business. Minorities compose 25% of Hillsborough County population, yet they have received only 0.86% of the dollars spent for procurement."

Pl.Ex.13, (Book 92, p. 140):

" . . . (3) that the *establishing of a program of equitable distribution* be based on a percentage of minorities constituting the minority population of Hillsborough County . . . "

Pl.Ex.14, (Book 95, p. 260):

" . . . Commissioner Bing said that . . . there comes a time in the history of this county, that the minorities and women *get their share of the public dollar.*"

Pl.Ex.16, p. 12:

"The objective of the program is to increase the participation of the DM/WBE."

(Continued on following page)

accepted the County's *ipse dixit* assertion of a benign and acceptable purpose.

Certiorari should be granted to re-affirm the principal that racial balancing in the expenditure of public funds is an impermissible purpose and such a purpose is, in and of itself, sufficient to render a program unconstitutional.

(Continued from previous page)

p. 15:

"IV. GOALS . . .

"A. To achieve parity, an overall average goal- . . . should be awarded to DM/WBEs . . . "

Pl.Ex.18, p. 4:

"Commissioner Bing said . . . that minorities and women *have not been getting a fair share* in the procurement and construction . . . "

p. 16:

" . . . Mr. Saunders stated he thought they were forgetting the role of government, that the role of government is . . . to see that all citizens *receive a 'piece of the pie'* – where it is found that there is disparity, the courts say you must also be color conscious."

Pl.Ex.24 (Book 118, p. 335):

"Mr. Robert Gilder, President, National Association for the Advancement of Colored People, stated the mechanism put in place *to insure that minorities, blacks and women received a fair share of the dollars spent* by the County seemed to be fair in dealing with what had been a disgraceful problem in the past wherein millions of dollars were spent by the County with only pennies going to blacks and women."

With respect to racially-preferential programs, this Court has held that "[t]he desire to have more black medical students or doctors[20] standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake', forbidden by the Constitution." *Croson*, 109 S.Ct, at 722, citing *University of California Regents v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750 (1978). Programs which apportion public dollars along racial lines in order to insure that all groups get their "fair share" are, if anything, even *more* suspect than those which seek to apportion educational resources; they are simply racial pork barrels created by elected officials seeking to curry favor with this or that particular ethnic or racial group. This is an anathema in a free society.[21]

In all of respondents' exhibits and evidence, there is no mention of any identified discrimination which is sought to be remedied. In fact, to the contrary, the documents in evidence indicate a concerted effort on the part of the County to rectify generalized discrimination, and

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[20] Or, for purposes of the Hillsborough County program, more minority subcontractors and prime contractors.

[21] As Justice Murphy declared, echoing the first Justice Harlan's lonely voice:

> Racial discrimination in *any* form and in *any* degree has *no* justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.
>
> *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).

demonstrate that the County was only concerned that " . . . the percentage of distribution [of minority participation receiving County funding] falls far short of the percentage of minorities in the total population of Hillsborough County."[22]

The expressed goal of Hillsborough's MBE program was to " . . . [establish a] program of equitable distribution [which] is based on the percentage of minorities constituting the minority population of Hillsborough County . . . ".[23] This reflects an impermissible, unconstitutional, racially-discriminatory purpose. Such an invidious use of racial classifications should not be blithely accepted and approved, as was done by the Court of Appeals, but should be ringingly rejected.[24]

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[22] Plaintiffs' Ex. 11 at p. 1.

[23] Plaintiffs' Ex. 11 at p. 2. All subsequent revisions of the statement of purpose (*e.g.*, the change to "to remedy the effects of past discrimination") and the later manipulation of statistics comparing the number of businesses, rather than population figures, were simply attempts to make cosmetic changes to fit the program within the parameters of what the county believed the law to require at any particular time.

[24] Justice O'Connor's citation in *Croson*, 109 S.Ct., at 723, to the decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842 (1986), was significant and instructive on this point but was ignored by the Court of Appeals in this case. The passage cited is a reminder and a caution – unheeded by the Court of Appeals – that the Fourteenth Amendment neither requires nor permits the official maintenance of any particular "mix" of the races; rather, it commands and *permits only* the elimination of officially sanctioned racial discrimination.

3. The Court of Appeals failed to require identification of discrimination

Certiorari should be granted to make it clear that statistical disparities alone, without being linked to any specific, identified, remediable practices which are alleged to have caused those "disparities", are not enough to justify implementation of a race-conscious program. That is, the phrase "identified discrimination" should be explicitly defined:

a. to exclude any current "underrepresentation" which can be traced or attributed only to amorphous and undifferentiated current effects of past discrimination (*i.e.*, "societal" or "generalized" discrimination) and

b. to exclude any condition or effect which cannot be tied to any specific discriminatory practice.

If the holdings of *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), and *Wards Cove Packing Company, Inc. v. Frank Atonio*, 109 S.Ct. 2115 (1989), are to mean *anything* it is that a remedial, race-conscious program must identify the evil sought to be remedied – not just a statistical reflection of that evil – with some specificity in order to pass constitutional muster. Hillsborough County did not identify any such evil and the Court of Appeals failed to require it to do so.

In this case, the County and the Court of Appeals identified only a statistical "disparity". It was then assumed that the "disparity" was caused by unspecified, unidentified effects of past discrimination. *Croson* requires that there be a more precise identification of the effect of discrimination sought to be eliminated (else the

"remedy" cannot possibly be "narrowly tailored" to fit its purpose).[25]

In this case there is *no* evidence of any properly identified discrimination. Nowhere in this record is there even *one* documented or substantiated instance of discrimination on the part of a non-minority prime contractor against a minority subcontractor or material supplier. Nowhere in this record is there an identification of even *one* discriminatory practice at which this program is aimed.

There are only repeated complaints of "underrepresentation", repeated incantations of the word "disparity", and the constant call for a "fair share" of public monies. But a desire to insure that a "fair share" of public monies are expended with particular racial and ethnic groups is not a constitutionally permissible purpose and such a desire is not enough to provide a "compelling interest" in utilizing race-based classifications. "Strict scrutiny" requires a more thorough investigation of the underlying causes of the "disparity" and requires that any remedy address those underlying causes and, as narrowly as

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[25] This would seem to be a most reasonable requirement because the disparity is not the evil; it is, if anything, merely evidence that a discriminatory practice may exist – a "flag" which alerts a fact-finder that further inquiry may be necessary.

In the Title VII context, *Wards Cove* required that statistical disparities be causally linked to an identified discriminatory practice in order to make out a *prima facie* case of discrimination for much the same reason. *Id.*, 109 S.Ct., at 2124. Although discussed at length in petitioners' appeal brief, *Wards Cove* was never even mentioned by the Court of Appeals in its decision.

possible, *only* those causes. This the Court of Appeals failed to require of Hillsborough County.

Although the Court of Appeals held that the County's Resolution "was not the result of some vague government desire to right past wrongs", 908 F.2d at 915, this conclusion is based *not* on strict judicial scrutiny of the facts. It is, instead, based (1) on the unsupported conclusion that "evidence" (statistics supposedly showing some "disparities") demonstrated the existence of discrimination in the construction industry (and, impliedly, that the discrimination was remediable if and only if a race-conscious program were instituted) and (2) on the premise that a statistical disparity provides sufficient identification of discrimination to permit the fashioning of a properly "narrowly tailored" remedy.

This opinion of the Court of Appeals does not reflect either the depth or breadth of judicial inquiry and scrutiny required when racial classification is the subject.[26] One of the flaws in the Court of Appeals' reasoning is that it permitted the "wrong" to be cured to be defined as a failure to achieve or maintain "parity"; that definition transmogrified the evidence of discrimination (racial imbalance) into the evil sought to be cured. This, in turn, allowed the goal of the program to become the elimination of the imbalance – not the elimination of the *cause* of the imbalance – and permitted the achievement of racial

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[26] Compare, *Old Colony Bondholders v. New York, N.H. & H.R. Co.*, 161 F.2d 413, 448-451 (2nd Cir., 1947) (Frank, J., dissenting, explicating and criticizing the "whoosh-whoosh" theory of judicial review).

balance to be substituted for the elimination of discrimination as the ultimate aim. This is clearly impermissible.

In undertaking "strict scrutiny" of racial classifications, it must be kept firmly in mind that it is not the statistical evidence which needs to be remedied; it is the discriminatory practice which gives rise to those statistics which is to be eliminated. This distinction was wholly overlooked by the Court of Appeals in this case.

4. The Court of Appeals permitted, in the field of public contracting, race-conscious legislation for a purpose unrelated to the remedying of identified discrimination

Without explicitly saying so, the Court of Appeals seems to have been influenced by this Court's recent decision in *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997 (1990), and read it as permitting a diluted form of "strict scrutiny" to suffice in MBE cases. The Court of Appeals has ignored the fact that, in the area of public contracting, the only allowable purpose of a race-conscious program is to remedy identified discrimination.

As noted, the Court of Appeals interpreted and applied *Croson* very narrowly and permitted enforcement of this race-conscious program without any identification by the County of specific discriminatory practices or effects at which the program was directed; it permitted the program to aim for the elimination of statistical "disparities", not the elimination of discriminatory practices. Only if, as in *Metro Broadcasting*, a purpose other than remediation is permissible does the Court of Appeals' decision make sense.

The Court of Appeals noted, but neither criticized nor commented upon, the fact that the County's overall "goal" included minority-owned businesses which were *not* "disadvantaged" (*i.e.*, were not suffering adverse effects attributable to discrimination), 908 F.2d at 910 (text accompanying footnote 3). Although the overall, annual "goal" is broken down in terms of disadvantaged and non-disadvantaged MBEs, the individual project "goals" which are imposed on the petitioners are *not* so broken out and a prime contractor may, under the regulations (Plaintiffs' Ex. 2), use any mix of "disadvantaged" and "non-disadvantaged" MBEs to fulfill the MBE "goal" on any particular project. That is, the "goals" set on individual projects bear no relation to the various categories set out in the Resolution defining the desired overall result; individual project "goals" relate only to the availability of businesses owned by minority-group members, disadvantaged or not.

Where, as here, the racial characteristics of the owners are divorced from any "disadvantage" suffered because of discrimination, the measure becomes one which favors certain persons *solely because of their race* and is constitutionally impermissible. In the field of public contracting, however, no purpose other than the remedying of identified discrimination is allowed.

Justice Stevens concurred in the *Metro Broadcasting* decision (upholding a race-based classification) and concurred in the *Croson* decision (striking down a race-based classification). Although it seems clear that Justice Stevens would permit a race-conscious program in a public contracting setting *only* if its purpose were remedial, *see Croson*, 109 S.Ct., at 731 (Stevens, J., concurring), this

is apparently not clear to the lower courts.[27] Certiorari should be granted to make explicit the fact that, in the field of public contracting, a majority of the Justices of this Court agree that the only proper purpose of a race-conscious program is to remedy discrimination which has been identified with some specificity.

5. The Court of Appeals failed to require an initial use of race-neutral or more narrow remedies

The Court of Appeals states in its opinion that race-neutral programs had been tried and found ineffective. This is simply not so and reflects the Court of Appeals' cavalier approach to judicial review of race-conscious programs.

First, the County never passed (and, therefore, never tried to enforce) any ordinance or resolution which simply prohibited discrimination in connection with public contracting. Such an enactment would seem to be the most elementary and obvious first step if the elimination of discrimination were truly the goal.

Second, and just as important, the 1978 program referred to by the Court of Appeals – the County's supposed attempt at a "race-neutral" remedy – was never funded.[28] Moreover, as stated in a memorandum to

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[27] *See, e.g., Harrison & Burrowes v. Cuomo*, ___ F.Supp. ___, 1990 WL 111494 (N.D.N.Y., 1990) and *H.K. Porter Co. v. Metropolitan Dade County*, ___ F.Supp. ___ (S.D.Fla., 1990), both citing the *Metro Broadcasting* decision as precedent in a public contracting setting.

[28] Plaintiffs' Ex. 3, at p. 1.

Robert W. Sanders, the director of the County's Equal Opportunity Office, from Jacqueline D. Barr of that same office in 1982, evidence " . . . indicates that there is little or no effort to properly implement the existing policy for minority/female participation aggressively."[29] Thus it is clear that even this attempt at a non-coercive, voluntary program was discarded before it was ever fairly tried.

The Court of Appeals held that this meager and half-hearted effort was sufficient for the County to conclude that race-neutral attempts would not be successful and to permit the implementation of a race-conscious program.[30] If this holding of the Court of Appeals is left to stand undisturbed, it will read out of the law the requirement that governments make good faith attempts to narrowly tailor their remedies by first attempting to enforce race-neutral remedies. *See Croson*, 109 S.Ct., at 728.

6. The Court of Appeals ignored the fact that the program had achieved its stated purpose

A race-conscious program may not continue to be enforced once its purpose (the eradication of discrimination and its effects) has been achieved. In this case, the county's avowed purpose was to increase the proportion of public monies spent with minority-owned businesses until it reflected the proportion that those businesses bore

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[29] Plaintiffs' Ex. 6, at p. 2.

[30] Since the County had never identified any particular instance of discriminatory conduct, it did not, of course, ever attempt the more narrow remedy – imposition of sanctions directed at specific companies found guilty of discrimination.

to the total number of businesses contracting with the County. As the Court of Appeals recognized, this goal has not only been achieved, it has been exceeded.[31] The Court of Appeals, however, endorsed the continuation of the program and reversed the district court's grant of an injunction.

Even if statistical disparities which existed in the past were sufficient to justify imposition of an industry-wide race-conscious program and even if "success" of a program could be measured by the elimination of the "disparities", certiorari should be granted to emphasize that once the disparities have ceased, the program must cease as well.

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[31] "In the fiscal year including October 1989, MBE participation in the projects in which goals were set totalled 19.6%, 8.5% less than the total resolution goal but *7.6% higher than the percentage of minority contractors in the County*." 908 F.2d at 911 (emphasis supplied)

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue, the judgment of the Court of Appeals should be reversed and the judgment and injunction of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

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The CONE CORPORATION, J.W. Conner & Sons, Cone Constructors, Inc., Dallas 1 Construction & Develp. etc., et al., Plaintiffs-Appellees,

v.

HILLSBOROUGH COUNTY, Larry J. Brown, Defendants-Appellants.

Nos. 89-3976, 90-3185 and 90-3191.

United States Court of Appeals, Eleventh Circuit.

Aug. 13, 1990.

Action was brought challenging constitutionality of county's minority business enterprise law. The United States District Court for the Middle District of Florida, No. 89-540-CIV-T-17A, Elizabeth A. Kovachevich, J., granted summary judgment invalidating law, and appeal was taken. The Court of Appeals, Johnson, Circuit Judge, held that issue of material fact as to whether county's minority business enterprise law violated equal protection precluded summary judgment.

Reversed and remanded.

Claude Tison, Jr., Tampa, Fla., for defendants-appellants.

Herbert P. Schlanger, Atlanta, Ga., Maxwell G. Battle, Jr., Dunedin, Fla., for plaintiffs-appellees.

Appeals from the United States District Court for the Middle District of Florida.

Before FAY and JOHNSON, Circuit Judges, and GIBSON*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

Hillsborough County, Florida, and Larry J. Brown, Administrator of Hillsborough County ("the County") appeal from the district court's grant of summary judgment in favor of plaintiffs/appellees The Cone Corporation, J.W. Conner & Sons, Inc., Cone Constructors, Inc., and Dallas 1 Construction & Development, Inc., a group of general contractors doing business in Hillsborough County ("the Cone group"). The County also appeals from the lower court's grant of a permanent injunction prohibiting operation of Hillsborough County's Minority Business Enterprise law ("MBE law").

I. STATEMENT OF THE CASE

A. *Background*

In the mid-to late-1970s, federal agencies that funded state and local construction projects began to impose minority participation requirements on entities wishing to receive grants.[1] As a result of these requirements,

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*Hon. Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit sitting by designation.

[1] The County cites the Public Works Employment Act of 1977, P.L. 95-28, 91 Stat. 116, and the Surface Transportation Assistance Act of 1982, P.L. 97-424, 96 Stat. 2097, as examples of federal statutes requiring minority participation. The County also refers to a 1977 letter from the Environmental Protection Agency to the County commission, which stated that as a condition of federal funding, "positive efforts [must]

(Continued on following page)

Hillsborough County initiated a Minority Business Enterprise ("MBE") program in 1978.[2] The County designed the program to comply with federal regulations on federally funded projects and to obtain information about minority business participation in non-federally funded contracting businesses in the County. The program was essentially voluntary; the County asked contractors to fill out forms detailing whether they had solicited MBE participation in making their bids on County construction projects.

In 1981, the Equal Opportunity Office ("EOO") began a study of the Hillsborough County MBE program. The study included surveys of the number of minority businesses in the County, the problems encountered by MBEs, and County expenditures to minority businesses. The

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be made by recipients of Federal assistance to utilize minority-owned business sources for supplies and services, allowing these sources the maximum feasible opportunity to compete for contracts and subagreements to be performed utilizing federal grant funds." The letter advised the commission to develop a list of minority resources in the area, reform bidding practices to facilitate minority participation, furnish technical assistance to minority business people, provide a liaison between non-minority and minority business people, and inform all bidders of minority participation requirements.

[2] MBEs are "enterprises which are more than fifty percent owned by women or members of designated minority groups." *Northeastern Florida Chapter of the Ass'n of General Contractors of America v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir.1990). For the purpose of this opinion, the term "minority" will include females. The term "MBE" will refer to minority enterprises in the construction business, not minority enterprises in general.

study indicated that minorities were significantly underrepresented in County contracts. Nevertheless, the County commission refused to develop a race-based plan in 1982, urging the staff to redouble efforts under the MBE program. In 1984, however, the County found that in spite of the MBE program, minorities and women were receiving a disproportionately small percentage of the County's construction business. The County concluded that without some affirmative legal obligation placed on contractors, the voluntary MBE program would fail to ensure MBE participation in County contracting projects. The County, therefore, began developing a race-conscious MBE law.

During various workshops and seminars on the subject, the County attorney's office told the various officials that such a law could be enacted only to remedy clear instances of past discrimination, and that the law would have to be narrowly drawn. After considering various ways to comply with the County attorney's advice, the County passed Resolution R88-D173, the Hillsborough County MBE law, at a special commission meeting on June 29, 1988. the objective of the law was to take affirmative action to eliminate past discrimination in County construction by ensuring that construction contractors and subcontractors provided equal opportunity employment to MBEs and increased participation by MBEs in all procurement activities. The law called for measures such as (1) arranging adequate time for submission of bids, (2) breaking large projects into several smaller projects to facilitate small business participation, (3) holding seminars or workshops to acquaint MBEs with County

procurement activities, (4) providing contracting opportunities for professional services, and (5) penalizing bidders who violate the intent of the MBE program or federal and state laws prohibiting discriminatory preference in contracting. The resolution established an annual goal of twenty-five percent total MBE participation in County construction,[3] with twenty percent of the participation coming from economically disadvantaged MBEs. The County implemented the resolution on July 11, 1988.

Under the law, the Goal-Setting Committee ("GSC") sets an MBE participation goal for each project. In setting the goal, the GSC reviews the available and eligible MBE contractors and compares them with the various subcontractable areas on the project. If there are at least three eligible MBEs in a subcontractable area, an MBE goal is set for that area. Goals may not exceed fifty percent MBE participation. After the goals are set for the entire project, the GSC discusses the goals. It looks at such issues as the complexity of the work and the necessity for high quality work in a particular subcontractable area. The goal for the project then is firmly set by the GSC. The project is advertised and a pre-bid conference, contractors may ask questions and discuss concerns, and the County has the opportunity to explain how the MBE requirements work. At any time prior to advertisement of the project, the

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[3] Jacqueline Barr, the county equal opportunity and affirmative action manager, testified that the federal Department of Housing and Urban Development ("HUD") told the County to allocate twenty-five percent of HUD-funded housing to minorities. There was no testimony, however, that this was the basis for the twenty-five percent county-wide MBE participation goal in the law.

MBE goals may be waived if minority participation cannot be achieved without detriment to public health, safety, or welfare, including the financial welfare of the County. The goals may not be waived once the project is advertised.

Next the County receives bids. The three lowest bids are transmitted to the manager of the MBE section for review. The low bidders have five days to submit their executed minority business contracts. The manager looks to see if the bids generally meet the MBE goals. If the goals are met, he recommends that the bid be awarded to the lowest bidder. If the MBE goals are not met by the lowest bidders, the bidders' good faith efforts are reviewed for "responsiveness."[4] Bidders whose bids are determined to be non-responsive are given time to submit protest letters to the Capital Projects Department. The Protest Committee decides whether to change the responsiveness determination. If the Committee doesn't change its determination and the next lowest bid is either $100,000 or fifteen percent higher than the low bidder, the MBE goal is waived and the low bidder receives the contract. If the next lowest bid is neither $100,000 or fifteen percent higher and the Protest Committee does not change the non-responsiveness determination, the County Administrator makes the final decision about whether to award the contract.

In the fiscal year including October 1989, MBE participation in the projects in which goals were set totalled

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[4] Responsive bidders are those who exercise efforts to obtain quality MBE contractor participation before submitting their bids.

19.6%, 8.5% less than the total resolution goal but 7.6% higher than the percentage of minority contractors in the County. The contract value of the MBE projects totalled 15.6% of the total contract value awarded. Goals were waived in some projects. The County deemed five low bids non-responsive upon initial review, but determined after the good faith review that all five were responsive.

B. *Procedural History*

1. Injunction

On April 18, 1989, the Cone group filed a complaint for declaratory and injunctive relief in district court for the middle district of Florida. The complaint alleged that the Hillsborough County MBE law created an unconstitutional racial preference which violated the equal protection clause of the Fourteenth Amendment. The complaint stated that the Cone group consisted of present and potential future bidders on Hillsborough County construction contracts who were subject to the MBE law and were adversely affected by it. Along with their complaint, the Cone group filed a motion for a preliminary injunction, requesting the court to enjoin further operation of the MBE law. The court set the preliminary injunction hearing for May 2, 1989, but decided at the time that further briefing was needed and set a second hearing for June 16, 1989. At this time the court informed the parties that it had only two hours for the hearing. As a result, only one witness presented live testimony. All other witnesses testified by deposition.

On October 16, 1989, the district court granted the Cone group's motion for a preliminary injunction. *Cone*

Corp. v. Hillsborough County, 723 F.Supp. 669 (M.D. Fla.1989). The court found that the Cone group had sustained irreparable injury because the MBE law perpetrated and extended the deprivation of their constitutional rights. Further, the court found a substantial likelihood that the Cone group would succeed on the merits under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Without providing any comparative analysis or explanation of its conclusion, the court stated that the Hillsborough County law was identical to the Richmond plan held invalid in *Croson*, and stated that the County's defense of its law was a waste of time and resources. *Cone Corp.*, 723 F.Supp. at 678-79. The County filed a motion for clarification requesting that the court modify the injunction to exclude the federally-assisted projects which required the County to operate an MBE program. The court denied that motion on November 17, 1989.

2. Summary Judgment

On October 18, 1989, the Cone group moved for summary judgment, based on their claim that there was no proof indicating that the County or prime contractors had discriminated against MBE contractors. The County responded that they needed more time for discovery to produce evidence of racial discrimination. On November 17, 1989 the court denied the summary judgment motion with a permission to refile after an appropriate interval for discovery.

The County appealed the October 16, 1986 grant of preliminary injunction and then moved to stay that order.

On December 28, 1989, the Cone group refiled their summary judgment motion. On January 19, 1990, this Court denied the motion for stay of the preliminary injunction pending appeal without prejudice and subject to renewal. On February 13, 1990, the district court granted the Cone group's summary judgment motion, ruling that the County had had adequate time to complete discovery. 730 F.Supp. 1568. On March 1, 1990, the district court entered a final order making the preliminary injunction permanent. The Court filed notice of appeal from both the February 13 and March 1 orders. Those appeals have been consolidated, and this Court has granted a stay of the permanent injunction pending resolution of this appeal.

3. Present Appeal

On appeal, the parties have raised the following issues: whether the district court erred in granting summary judgment in favor of the Cone group on the grounds that the MBE law violated the equal protection clause, whether the district court erred in finding that the Cone group suffered irreparable injury sufficient to justify the grant of the preliminary injunction, and whether the permanent injunction is overbroad and should be modified to exclude federally funded projects. Because we find that the district court erred in granting summary judgment in favor of the Cone group, we do not reach the second and third issues.[5]

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[5] The County's challenge to the issuance of the preliminary injunction is moot regardless of our disposition of this

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II. ANALYSIS

A. *Introduction*

In rejecting the Hillsborough County MBE law, the district court relied on *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Croson* involved a Richmond, Virginia MBE plan which required prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to an MBE. Contractor Bonn wished to bid on a city project to install plumbing in the city jail. Seventy-five percent of the job involved provision of

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case on its merits because a permanent injunction has issued. *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877, 880 (7th Cir.1990) (where a permanent injunction has been granted that supersedes the original preliminary injunction, appeal from an interlocutory preliminary order is properly dismissed); *New York State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1350 (2nd Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) ("the appealability of the district court's grant of a preliminary injunction is moot . . . because the district court subsequently granted a permanent injunction"); *United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401, 403 (3rd Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 363, 107 L.Ed.2d 350 (1989) ("[o]nce the order granting the permanent injunction was entered, the order granting the preliminary injunction merged with it, and appeal is only proper from the order granting the permanent injunction."); *Securities and Exchange Comm'n v. First Financial Group of Texas*, 645 F.2d 429, 433 (5th Cir.Unit A 1981) (once an order of permanent injunction is entered, the preliminary injunction merges with it and appeal may be had only from the order of permanent injunction).

fixtures. Thus, in order to meet the thirty percent MBE set-aside requirement, Bonn had to hire an MBE to provide the fixtures. The only MBE interested in the project was unqualified and, as a result, Bonn lost the bid. *Id.* 109 S.Ct. at 715-716. A plurality of the Supreme Court struck down the Richmond plan as a violation of the equal protection clause. *Id.* at 730.

Because disposition of this case revolves around the *Croson* opinion, we note at the outset what *Croson* did and did not do. The plurality holding did no more and no less than strike down the specific elements of the Richmond plan. It did not, as Justice Scalia would have had it do, limit a local government's authority to implement affirmative action plans to those instances constituting "a social emergency rising to the level of imminent danger to life and limb." *Croson,* 109 S.Ct. at 735. In fact, the plurality intimated that a locality could enact race-conscious legislation if such legislation was necessary to redress clear instances of discrimination and was narrowly tailored to achieve that goal. *Id.* at 720-722. On the other hand, neither did *Croson* provide a set of standards or guidelines describing the kind of MBE plan that would pass constitutional muster. It simply provided a stringent burden of proof for proponents of MBE laws to meet – they must be able to show that there were actual instances of past discrimination, that the MBE plan is necessary to remedy the discrimination, and that the plan is narrowly tailored to that goal. The Court described an outer perimeter of unacceptable behavior; plans which fall on or outside of that perimeter are clearly unconstitutional, while the constitutionality of plans which fall

inside the perimeter apparently depends on the contours of the individual plan.

Although the Hillsborough County law appears similar to the plan struck down in *Croson*, the County argues that the plans are different enough to warrant a finding that the County plan falls well within the *Croson* perimeter. The district court did not address these differences. The court's opinion consists of (1) a detailed rendering of the Hillsborough County plan, (2) a similarly detailed breakdown of the *Croson* opinions, and (3) commentary regarding the court's displeasure with the absence of a stipulation of preliminary injunction.[6] The court did not explain how the County law failed to meet constitutional standards. After comparing the Court law with the outer perimeter established in *Croson*, we conclude that the County law falls inside that perimeter and thus is constitutionally valid. In the discussion that follows, we first will recite the infirmities in the Richmond plan. We then will contrast the Hillsborough County plan to demonstrate why we find that the County plan survives constitutional scrutiny when the Richmond plan did not.

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[6] The district court stated,

> After spending valuable judicial time on this case, and after reviewing the *"best evidence"* brought forward by the defendants, the Court is at a loss to understand why there has been no stipulation for entry of a preliminary injunction herein. This Court is forced to question the good faith of defendants in opposing the efforts of plaintiffs to suspend the MBE program of Hillsborough County, Florida.

Cone Corp., 723 F.Supp. at 678.

B. *Standard of Review*

Appellate review of a district court's grant of summary judgment is *de novo. Ships v. Hanover Ins. Co.*, 884 F.2d 1357, 1359 (11th Cir.1989). We must decide whether there is any genuine issue of material fact raised by the evidence presented. *Id.* We must make this decision in light of the applicable constitutional standards. Like the Richmond plan, the Hillsborough County MBE plan is a race-conscious measure. When reviewing the constitutionality of such a measure, courts apply strict scrutiny. *Croson*, 109 S.Ct. at 721; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986). Under strict scrutiny analysis, the racial classifications must be necessary and must be narrowly tailored to achieve the goal of remedying the effects of past discrimination. *Wygant*, 476 U.S. at 279-80, 106 S.Ct. at 1849-50.

The *Croson* plurality went into detail in explaining how strict scrutiny is applied to MBE plans. First, at a base minimum, any plan must have more than an amorphous claim that there has been discrimination in a particular industry. Where plans establish quotas, the quotas must be tied to some injury suffered by the minority to be benefitted. *Croson*, 109 S.Ct. at 724. In establishing this particularized discrimination, numerical disparities may be relevant if they result from a comparison of the number of qualified MBEs in the particular industry and geographic area with the number actually utilized in government contracts. At a minimum, however, the government entity must consider the number of qualified MBEs in the relevant market and the percentage of total city dollars minority firms receive. *Id.* at 725. Second, the

plan must be narrowly tailored to remedy the discrimination. This means that the plan must be designed to further some goal other than outright racial balancing. Further, the government must have considered a race-neutral scheme before establishing the race-conscious scheme. *Id.* at 728.

C. *Necessity of Racial Classifications*

The *Croson* plurality found that the city of Richmond had not proven that the racial classifications in its MBE plan were necessary. The Court acknowledged the deplorable past history of private and public discrimination which contributed to the lack of opportunities for minorities, but concluded that "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Croson,* 109 S.Ct. at 724. The Court stated that the mere fact that the program was labelled "remedial" in nature was not sufficient to prove necessity. *Id.*

In particular, the *Croson* court faulted the following factual predicates on which Richmond based its plan:

> (1) The Richmond plan purported to remedy general past discrimination in the entire construction industry, rather than discrimination in the Richmond area construction industry;
>
> (2) The city adopted its plan based on non-racial factors contributing to the small number of MBEs;
>
> (3) The city labelled its program "remedial," without proof of prior discrimination to support that label;

(4) The city based its decision to implement the plan in part on the fact that a city official who supported the plan felt that there was discrimination in the construction industry in the area and the state;

(5) The city relied on the disparity between the number of prime contracts awarded to MBE contractors and the total minority population of the city, rather than the disparity between the total number of contractors and the number of MBE contractors;

(6) The city did not know how many MBE contractors in the relevant market were qualified to undertake work on public projects;

(7) The city did not know what percentage of total city construction dollars MBE contractors received as subcontractors on city contracts;

(8) The city relied on evidence that MBE contractor membership in local contractors' associations was extremely low, without linking that fact to the number of local MBE contractors eligible for membership; and

(9) The city relied on Congress' finding in connection with the set-aside approved in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1979) that there had been nationwide discrimination in the construction industry.

Hillsborough County's MBE law is materially different from the Richmond plan, mainly because the Hillsborough County law was enacted as a result of statistics tabulated during the six years that the MBE program was in effect. These statistics indicated the following:

(1) An analysis of statistical data on minority businesses, which included a review of contracts awarded by the County over a three-year

period, indicated that minorities (in particular blacks and women) were significantly underrepresented in such awards.

(2) According to data collected in 1983,[7] minorities made up ten percent of the business population in Hillsborough County. Narrowing the category to construction contractors, MBE contractors comprised twelve percent of the total contractor population of Hillsborough County.

(3) Between October 31, 1982 and July 31, 1983, 7.89% of the purchase orders awarded by the County were awarded to minorities. Of County dollars spent for purchases, 1.22% of the total County dollars expended went to minorities.

(4) Between July 12 and July 30, 1982, 6.3% of the total bids awarded by the County were awarded to minorities. Approximately 6.5% of the average dollar amount of the bids was awarded to minorities.[8]

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[7] The studies also provided the following statistics for the percentage of County money going to MBE contractors in earlier years:

1979-80	blacks	.03%
	hispanics	2.24%
	female	0.00%
1980-81	blacks	.03%
	hispanics	1.94%
	females	.24%

These statistics were taken, however, before a director of MBEs in the area had been compiled. There is no way to compare these numbers to the number of qualified MBEs available during those years, so they have no relevance to a determination of whether they were the result of discrimination.

[8] The total dollar amount awarded was $2,942,919.27. the bulk of this amount, however, consisted of a single bid for

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(5) At least three people received a number of complaints alleging discrimination in County construction and procurement.

While some of the factors relied on by Hillsborough County are identical to those rejected in *Croson*,[9] other factors are markedly different. Unlike Richmond, Hillsborough County decided to implement its law based on statistics indicating that there was discrimination specifically in the construction business commissioned by the County, not just in the construction industry in general. The County documented the disparity between the percentage of MBE contractors in the area and the percentage of County contracts awarded to those MBE

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$2,257,327.10. After subtracting this disproportionately large bid, the total dollar amount for the remaining bids was $685,592.10, $44,917.25 of which went to minorities.

[9] The Hillsborough County studies demonstrated that MBEs faced such primary obstacles as lack of access to capital, inability to obtain adequate surety bonding, and lack of capable managers and adequate training programs. Justice O'Connor stated in *Croson*, however, that such evidence proves only "an amorphous claim that there has been past discrimination in a particular industry," *Croson*, 109 S.Ct. at 724, and does not justify the use of a quota. The Hillsborough County Commissioner who served between March 1983 and May 1985 stated that in his opinion, the county and prime contractors practiced discrimination. Justice O'Connor, however, clearly stated that such legislative allegations do not suffice to prove discrimination called for racial classifications. *Croson*, 109 S.Ct. at 724 (sheer speculation as to how many minority business would exist absent past societal discrimination is not sufficient); 725 ("when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals").

contractors. Hillsborough County determined the percentage of County construction dollars going to MBE contractors compared to the total percentage of County construction dollars spent. It is clear, in other words, that the County MBE law was not the result of some vague government desire to right past wrongs. The law resulted from prolonged studies of the local construction industry that indicated a continuing practice of discrimination.

The statistics gleaned from these studies provide a prima facie case of discrimination sufficient to clear the summary judgment hurdle.[10] The *Croson* Court stated that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination." *Croson*, 109 S.Ct. at 725 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977)). The data extracted from the studies indicates that while ten percent of the businesses and 12% of the contractors in the County were minorities, only 7.89% of the County purchase orders, 1.22% of the County purchase dollars, 6.3% of the awarded bids, and 6.5% of the awarded dollars went to minorities. The statistical disparities between the total percentage of minorities involved in construction and the work going to minorities, therefore, varied from approximately four to

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[10] At oral argument, counsel for the County stated that from the time the district court entered the preliminary injunction until the time this Court stayed that injunction pending appeal, not one subcontracting dollar on any County bid went to a black subcontractor. If true, this fact would clearly point to discrimination. The record, however, contains no evidence in support of counsel's contention.

ten percent, with a glaring 10.78% disparity between the percentage of minority contractors in the County and the percentage of County construction dollars awarded to minorities. Such a disparity clearly constitutes a prima facie case of discrimination indicating that the racial classification in the County plan were necessary.

Further, there was clear evidence that MBE contractors made numerous complaints to the County regarding discrimination by prime contractors. At least one witness, a former County commissioner, testified that MBE contractors had called his office during his tenure as commissioner and complained of discriminatory treatment. According to the complaints, when MBE contractors approached prime contractors, some prime contractors either were unavailable or would refuse to speak to them. Other prima contractors would accept estimates from MBE subcontractors and then not submit those estimates with their bids. Contrary to their practice with non-minority subcontractors, still other prime contractors would take the MBE subcontractors' bids around to various non-minority subcontractors until they could find a non-minority to underbid the MBE. Non-minority subcontractors and contractors got special prices and discounts from suppliers which were unavailable to MBE purchasers. The testimony regarding these complaints, combined with the gross statistical disparities uncovered by the County studies, provides more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a motion for summary judgment.

D. *Narrowly Tailored to Remedy Discrimination*

The *Croson* Court discussed several problems with the Richmond plan which demonstrated that that plan was not narrowly tailored to remedy past discrimination. First, Richmond did not consider the use of any race-neutral means to increase MBE participation before it instituted its MBE plan. *Croson,* 109 S.Ct. at 728. Second, the thirty percent participation goal set by Richmond's plan unrealistically assumed that minorities would choose the construction trade in "lockstep proportion" to their total representation in the local population. *Id.* The imposition of such a "rigid numerical quota" disturbed the Court because it showed no concern for whether a particular MBE seeking construction work under the plan had suffered from past discrimination. *Id.* at 729.

The Hillsborough County MBE plan differs from the Richmond program in these respects. Unlike Richmond, the County tried for six years to implement an MBE program whereby contractors would list their minority subcontractors and thereby become more aware and accountable regarding MBEs. It adopted the MBE law only when this MBE program failed to remedy the discrimination. Further, when the County passed the MBE law, it included in the law all of the race-neutral measures suggested in *Croson.*[11]

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[11] The *Croson* Court listed a "whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races." *Croson,* 109 S.Ct. at 729, including simplified bidding procedures, relaxed bonding

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The twenty-five percent total MBE participation goal set by Hillsborough County, unlike Richmond's rigid thirty percent goal, is flexible. At oral argument, in fact, counsel for the County stated that the County actually uses a working goal of only nineteen percent. The number is not a quota, but exactly what it is called in the law – a goal. Neither does the twenty-five percent goal apply to every individual project. The GSC sets goals for each individual project based on the number of *qualified* MBE subcontractors available for each subcontractable area. If there are not at least three qualified MBE subcontractors available for the subcontractable area, *no goal is set* in that area. In areas where goals are set, no goal may ever exceed fifty percent MBE participation. At any time prior to advertisement of the project, the goals can be waived. A low bidder who does not meet the plan goals still can obtain a contract simply by demonstrating a good-faith effort to find MBE contractors. Even absent such good faith efforts, the contractor may still receive the contract if the next lowest bid is either $100,000 or fifteen percent higher than the non-responsive bidder.

Further, the Richmond plan was not "narrowly tailored" to remedy past discrimination in Richmond's construction industry because the set-aside requirement applied equally to African-Americans, Hispanics, Indians, Eskimos, and Asians, in spite of the fact that

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(Continued from previous page)

requirements, and training and financial aid. While the *Croson* Court referred to these measures as alternatives to MBE plans, including of such measures in an MBE plan would lend to the plan's flexibility. The County included these measures in its law.

some of those groups were not represented in Richmond. The Richmond plan thus did more than remedy past discrimination, it benefitted groups against whom there may have been no discrimination. *Croson*, 109 S.Ct. at 728. The Hillsborough County law, unlike the Richmond plan, breaks its twenty-five percent MBE participation goal down by minority groups, targeting African-Americans, Hispanics, women, and "others".[12] The "others", groups such as Eskimos who may not be represented in the County and Asians and Indians who are represented in the County, are targeted for only one percent participation in the present law. Further, the County law targets its benefits to those MBEs most likely to have been discriminated against – those MBEs disadvantaged in terms of size, volume of business, and number of employees. The premise behind this provision is that large and successful MBEs are likely to have overcome the effects of discrimination, while smaller, struggling businesses still suffer discrimination's ill effects. Those smaller businesses, therefore, get at least eighty percent, if not all, of the

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[12] The law breaks the 25% goal down as follows:

Black	10%
Hispanic	7%
Women	2%
Other	1%

Total Economically Disadvantaged MBEs	20% participation
Economically Non disadvantaged MBEs	5%participation

law's benefits. Again these differences between the Richmond plan and the Hillsborough County law clearly raise issues of material fact sufficient to preclude the grant of summary judgment.

Even a cursory comparison of the Hillsborough County law and the Richmond plan demonstrates that the two are vastly different in critical areas. The County painstakingly crafted its law, and has carefully avoided the problems which caused the downfall of the Richmond plan. Under the County law, a contractor never faces the *Croson* situation, where in order to fill a rigid quota he or she is required to hire MBEs for a job that no MBEs are available, willing, or qualified to do. The County law incorporates all of the race-neutral measures which the *Croson* plurality recommended. It is difficult to understand how the district court could, without any kind of articulated comparative analysis, conclude that the Hillsborough County law is unconstitutional under *Croson*. We find that the County law differs dramatically from the Richmond plan struck down in *Croson* and that the facts warrant further development and scrutiny at a trial.

III. CONCLUSION

For the reasons discussed above, we REVERSE the district court's grant of summary judgment. We DISMISS the County's appeal from the grant of preliminary injunction as moot, and REMAND the remaining issues for further proceedings consistent with this opinion.

The CONE CORPORATION et al., Plaintiffs,

v.

HILLSBOROUGH COUNTY, et al., Defendants.

No. 89-540-CIV-T-17(A).

United States District Court,
M.D. Florida,
Tampa Division.

Oct. 16, 1989.

Construction companies filed suit against county challenging county's minority business plan for government contractors. On motion for preliminary injunctive relief, the District Court, Kovachevich, J., held that construction companies established likelihood of prevailing on merits of their claim that county's minority business plan for governmental contractors resulted in minority discrimination, and thus construction companies were entitled to preliminary injunctive relief.

Motion for preliminary injunction granted.

Herbert P. Schlanger, Atlanta, Ga., Maxwell G. Battle, Jr., R. Michael Deloach, Maxwell G. Battle, Jr., P.A., Dunedin, Fla., for plaintiffs.

Claude H. Tison, Jr., Michael D. Malfitano, MacFarlane, Ferguson, Allison & Kelly, Tampa, Fla. for defendants.

ORDER ON MOTION FOR
PRELIMINARY INJUNCTION

KOVACHEVICH, District Judge.

This cause of action is before the Court on the following motions, responses, and documents in support thereof:

1. Plaintiffs' motion for preliminary injunction and memorandum in support thereof, filed April 18, 1989 (Docket Nos. 3 and 4).

2. Affidavit of Douglas P. Cone in support of motion for preliminary injunction, filed April 27, 1989. (Docket No. 6).

3. Defendants' analysis and summary of *City of Richmond v. J.A. Croson*, filed May 26, 1989. (Docket No. 13).

4. Plaintiffs' notice of supplemental authority and discussion thereof, filed June 9, 1989 (Docket No. 16).

5. Transcript of evidentiary hearing of June 16, 1989, filed June 19, 1989, and exhibits thereto. (Docket No. 20).

6. Plaintiffs' separate memorandum of analysis of *City of Richmond v. J.A. Croson*, filed June 27, 1989. (Docket No. 30).

7. Deposition of E.L. Bing, taken June 21, 1989, and filed July 6, 1989.

8. Deposition of Spencer Albert, taken June 21, 1989, and filed July 6, 1989.

9. Deposition of Robert Gilder, taken June 21, 1989, and filed July 6, 1989.

10. Plaintiffs' response to Defendant's memorandum in opposition to Plaintiff's motion for a preliminary injunction, filed July 17, 1989 (Docket No. 25).

11. Defendants' memorandum in opposition to petition for preliminary injunction, filed July 19, 1989. (Docket No. 26).

Complaint in this cause of action was filed April 18, 1989, by Plaintiffs, The Cone Corporation; J.W. Conner & Sons, Inc.; Cone Constructors, Inc.; and Dallas 1 Construction & Development, Inc. against Defendants Hillsborough County and Larry J. Brown, Administrator of Hillsborough County.

The complaint alleged Defendants had, since at least 1984, engaged in a pattern and practice, and has had a custom and policy, of discrimination in the construction industry in favor of certain racial and ethnic groups and in favor of females, pursuant to County Resolution No. R88-0173 and Administrative Order implementing same. On August 15, 1989, Plaintiffs amended the complaint to add the following Plaintiffs: Bulger Contracting Co.; Boyce Company; S & E Contractors, Inc.; Woodruff & Sons, Inc.; and Suncoast Utility Contractors Association.

FACTUAL BACKGROUND

1. Plaintiffs are challenging Hillsborough County Board of County Commissioners Resolution No. R88-1073 (the Resolution), adopted by the Board of County Commissioners (Board or Commission) June 29, 1988, and implemented through an Administrative Order. The current resolution is the latest in a succession of similar resolutions, the first was passed in 1984.

2. The preceding resolutions were: No. R84-1003, adopted June 20, 1984; R86-0170, adopted August 27, 1986; and R87-0249, adopted September 8, 1987. The current Resolution, as well as the preceding resolutions, implement a minority business contracting program.

3. In 1978 the Board adopted a minority-female vendor contractors program, which was essentially a voluntary program. The program required Hillsborough County (the County) to solicit the utilization of minority and female businesses in procurement and required contractors consider utilizing them on County construction projects. (Trial Transcript (TT) pgs. 8-9). The contractors were to list on the bid form their subcontractors; and, on a separate form, were asked to indicate if they solicited minority participation. (TT pg. 12).

4. Starting in 1981, the Equal Opportunity Office (EOO) was directed to review the affirmative action plan to determine if it was "inclusive of all elements designed to perpetrate discrimination." (Def. Ex. 35; TT pg. 9). In the process of reviewing the program, there were several steps taken, including:

> I. A survey was conducted by contacting the Greater Tampa Chamber of Commerce, City of Tampa License Department, Hillsborough County and the Planning Commission to determine the total number of businesses in the County and how many were minority businesses. The survey was unsuccessful as the agencies contacted did not maintain the statistics necessary to the inquires. (Def. Ex. 35).
>
> II. An analysis of statistical data on minority business was collected, to "justify the need for" a minority business program. The analysis included reviewing contracts awarded to businesses by the County in the previous three (3) years. Then a determination was made as to what percentage and dollar value of these contract awards were to minorities and female businesses. The conclusion of that study was that minorities (in particular Blacks and Women)

were significantly underrepresented in such awards. (Def. Ex. 35).

III. A study on minority business enterprises (MBEs), as outlets for placing CETA trainees, was conducted by J.H. Lowry and Associates, on contract with the U.S. Department of Labor. Although the study was directed at the City of Tampa, the EOO Director recommended that the report be utilized to "correct current effects of past discrimination in employment and contracting for goods, services and construction." The report stated, without evidentiary support, that the primary obstacles for MBES were: 1) lack of access to capital; 2) inability to obtain adequate surety bonding; and 3) lack of capable managers and adequate training programs. (Defs. Ex 11).

IV. Surveys were done of County expenditures compared with the percentages of business done by minority or female businesses.

a. The EOO reported on March 1, 1989, on the survey of the fiscal years 1979/80 and 1980/80. The report is reproduced and attached hereto as Exhibit A.

b. A minority achievement report from the Director of the Office of Operations was made to the EOO on August 18, 1982. The report encompassed the period from July 12 to July 30, 1982, and addressed the racial breakdown of minority vendors who desired to do business with the County. The report is reproduced and attached hereto as Exhibit B. (Defs. Ex. 15).

c. A second progress report on MBEs was made for the period from October 31, 1982 to July 31, 1983. The report stated that the efforts had been increased to solicit minority and women businesses, but that there

was still a disproportionate number of "minority businesses not obtaining purchases." The reasons provided for the disparity were: 1) a substantial amount of dollars spent by the purchasing department were in the commodities area and minority businesses for commodities were at the retail sales level which increased the price; 2) minority businesses were not aware of the structure for procurement, which limited their resources for obtaining bid information; 3) prime contractors did not solicit or award minority subcontracts; 4) prices quoted by MBEs tended to be higher due to financial status; and 5) obtaining bonds was difficult. The statistical report appended to the report is reproduced and attached hereto as Exhibit C. (Defs. Ex. 17).

d. In a November 5, 1989, summary of the "numbers used in the development of the County's Disadvantaged Minority/Disadvantaged Women Business Enterprise Program (DMBE/DWBE)," the MBE Administrator provided the following as additional sources in determination of underrepresentation: 1) the 1980 Census of Hillsborough County as compared to the number of minority business (Reproduced and attached as Exhibit D, Table A); 2) notification from Office of Revenue Sharing to County to correct past practices in hiring of females and minorities; and 3) citation by the Environmental Protection Agency (EPA) for failure to provide minority and women businesses with a fair share of participation in procurement activities. (Def. Ex. 35).

e. The County Commission held several workshops on the subject of minority businesses. (Pl. Exs. 16, 18, and 22 and Defs. Ex. 24, 22 and 27).

5. Defendant's witness Jacqueline Barr testified that during the time prior to the adoption of the first resolution, the Federal Department of Housing and Urban Development (HUD) directed the County to implement minority participation, at twenty-five (25%), on HUD sponsored projects. (TT pg. 10).

6. Ms. Barr also testified that the County received various complaints alleging discrimination existed in County construction and procurement. In response to these complaints, the County held a series of public and private meetings to gather input from the minority and majority business community. The public was invited to participate in these meetings by notice through news releases and announcements over the radio and in the newspapers. (TT pg. 29). The County also sent letters announcing the meeting to those persons that they knew were interested, such as a person who had made a previous complaint. (TT pg. 30).

7. The County witness, Jacqueline D. Barr, testified that the County received indication of "discrimination" at the public hearings and that she "thought" approximately sixty percent of the minority businesses in attendance complained, including Blacks, Hispanics and Women, and the complaints were *directed to the actions of the prime contractors.* (TT pgs. 31-31).

8. At the time of the adoption of the first resolution, Robert Gilder was the President of the NAACP, and, as such, he notified the County when he received complaints. (Depo. pgs. 4-6). On July 29, 1981, he wrote to Chairperson, Jan Platt, urging the County Commission to

take certain actions aimed at assisting minorities, especially Blacks, in participating in County procurement and contracting. (Def. Ex. 12).

9. Mr. Gilder's "data" was based on information and complaints received from other persons. He did little or *no* independent investigation of the complaints; he simply passed them on to the County for their edification. (Depo. pgs. 9, 24, 33-34). In addition, Mr. Gilder participated in workshops, testified before the Commission, and served on committees in this area. (Depo. pg. 13).

10. Mr. E.L. Bing was a County Commissioner for two (2) years between March 1983 and May 1985. (Depo. pg. 5). During his tenure, he received complaints from Blacks and other minority businesspersons regarding their exclusion from County work based on race and sex. (Depo. pgs. 5-6). The complaints were "continuous." (Depo. pg. 6).

11. In Mr. Bing's *opinion*, discrimination existed in County contracting business as to the amount of work awarded to Blacks, Hispanics, and Women. Further, in his *opinion*, the discrimination was practiced by the County and the prime contractors. (Depo. pgs. 9-10). For example, there were allegations made of "price-fixing" and "bid shopping" for Whites, but Mr. Bing stated he did not follow the industry and he doesn't know "how true it was." (Depo. pg. 15).

12. Mr. Bing testified that as a result of the complaints the Commission directed that a study be made. The studies were shared with the Commission at workshops. (Depo. pgs. 8, 16). The Commission then designed

a program to correct past discrimination and correct the imbalance against Women, Blacks, and Hispanics. (Depo. pg. 19). Ms. Barr testified that the program was designed to *ensure equitable distribution* of County funds (including federal funds awarded to the County) along racial, ethnic and sexual lines. (TT pgs. 46, 63).

13. The current resolution R88-0173 was adopted at a special Commission meeting of June 29, 1988. The resolution reads in relevant part:

WHEREAS, the Hillsborough County Board of County Commissioners (BOCC) has reviewed historical statistical data regarding the expenditure of funds to minority business enterprises, disadvantaged minority business enterprises, disadvantaged women business enterprises (MBE/DMBE/DWBE) as defined by Hillsborough County in comparison to the total expenditure of funds in Hillsborough County's procurement program; and

WHEREAS, based upon the aforementioned data, the BOCC finds that such business enterprises have been disproportionately under-represented as participants in and recipients of Hillsborough County's procurement program involving contracts for material, supplies and/or the provision of consulting and construction services to the County; and

WHEREAS, the BOCC recognizes its obligations to ensure that its contracting practices and contracting practices of its contractors and subcontractors provide a full and equitable opportunity, through affirmative action, to MBE, DMBE and DWBE firms; and

WHEREAS, the BOCC has reaffirmed its commitment to Equal Employment Opportunity and Affirmative Action.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY, assembled this 29th day of June, 1988, as follows:

1. *Policy*. It is the policy of the Hillsborough County Board of County Commissioners that MBE/DMBE/DWBEs shall have the maximum opportunity to participate in the County's procurement programs and to encourage such participation by such business enterprises.

2. *Objectives*. The objectives of the MBE Program are to take specific affirmative action to eliminate discrimination and the effects thereof, to ensure that construction contractors and subcontractors provide equal opportunity through employment of minorities and women, and to increase participation by minority businesses in all procurement activities.

3. *Applicability*. This resolution shall apply to all procurement activities under the Hillsborough County Board of County Commissioners.

4. *Appendix*. The attached document marked "Appendix A: is incorporated as a part hereof by this reference. (The appendix is not attached hereto).

5. *Definitions*. Definitions are included in the appendix to this resolution.[1]

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[1] Because the definitions of the Resolution are not made part of this Order, the Court would like to take note of one

(Continued on following page)

6. *Discrimination Prohibited.* No person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any Hillsborough County procurement action on the grounds of race, color, national origin, or sex.

7. *Program Administration.* The County Administrator has the general responsibility for administering the MBE Program and implementing the

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(Continued from previous page)

definition which it finds particularly relevant to the issues raised herein. At Number 17 the Resolution defines Minority Group Members as follows:

> Member(s) or individual(s) who are citizens or lawful permanent residents of the United States and who are Black (not of Hispanic origin), Hispanic, American Indian, Alaskan Native, Asian, or Pacific Islander. *Women are considered as minority group members for purposes of this program.*
>
> a. Black – a person having origins in any of the black racial groups of Africa.
>
> b. Hispanics – a person of Spanish or Portuguese culture with origins in Mexico, South America, Central America, or the Caribbean Islands, regardless of race.
>
> c. Asian – a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.
>
> d. American Indian or Alaskan Native – a person having origins in any of the original peoples of North America.
>
> e. Women – For purposes of this program, women are considered as minority group members.

BOCC's Policy. The Equal Opportunity & Human Relations Department, Director shall be responsible for developing, managing, and implementing the MBE Program on a day-to-day basis; and such other responsibilities as are set forth in this Resolution. The County Administrator may promulgate such administrative procedures consistent with this Resolution or any Federal or State law, regulation or grant requirement. In addition, for those projects which are in whole or in part funded by federal grants the County Administrator shall amend administrative procedures to be consistent with amendments to the pertinent Federal grant regulations or laws.

8. *Procedures to Ensure that MBE's Have an Equitable Opportunity to Compete for Contracts and Subcontracts.* The County shall use the following techniques to facilitate MBE participation in contracting activities:

a. The County will arrange adequate time for the submission of bids and bid specifications so as to facilitate the participation of MBE/DMBE/DWBEs.

b. The County, to the extent economically and legally feasible, will break down the scope of large projects into smaller contractual parts to facilitate the participation of smaller businesses.

c. The County will hold seminars or workshops periodically to acquaint the minority business community with the requirements and scope of its procurement activities. These efforts will be coordinated with organizations that are familiar with and willing to reduce problems experienced by MBE/DMBE/DWBEs.

d. The County will review and evaluate for certification those applicants for the MBE

Program. This review will include all documentation necessary to establish the legitimacy of the applicants' firm. Only those businesses certified by Hillsborough County, by the time of bid opening, will be counted toward goal attainment.

e. The County will provide contracting opportunities for professional services pursuant to Section 287.055 Florida Statutes, known as the "Consultant's Competitive Negotiation Act" as well as other professional services solicited through the competitive bid or Request for Proposal process. MBE Program procedures will be included in each solicitation.

f. The County will apply appropriate penalties to bidders who fail to perform properly, by commission or omission, of acts of a serious nature that violate the intent of the MBE Program and other relevant Federal and State laws.

g. All bid specifications will require prime contractors to make good faith efforts to utilize MBE/DMBE/DWBEs.

h. All prime contractors will be required to complete documentation listing all minority contractors contacted; giving the results thereof.

9. *Directory.* The County shall have available resources, including directories or lists, to facilitate in the identification of County certified MBE/DMBE/DWBEs whose skills are needed in the performance of County contracts. The County shall make such resources available to bidders in their efforts to meet the MBE Program requirements.

10. *Overall Goal.* The County hereby establishes an annual goal of twenty-five percent (25%) for the MBE Program. This goal applies to all construction related

procurement on projects that are $100,000.00 and above. There is a 5% goal for nondisadvantaged minority business enterprises (MBEs and a 20% goal for disadvantaged minority and disadvantaged women business enterprises (DMBEs/DWBEs). Where possible, the desired breakdown of the MBE/DMBE/DWBE participation should reflect 18% of the contract price being provided to DMBEs and 2% to DWBEs. Target percentages are as shown:

MBE (NonDisadvantaged) –	5% goal
Black	10%
Hispanic	7%
Women	2%
Other	1%

A five percent (5%) annual goal is established for purchase of goods and services under vendor program and a five percent (5%) annual goal is established for consultant services contracts

The County will establish goals for MBE/DMBE/DWBE participation on a project by project basis. However, goals established for an individual project shall not exceed fifty percent (50%).

11. *Set-Aside.* The County will provide a set-aside provision whereby specific projects in an estimated amount of $100,000.00 or less may be available for bid by DMBE/DWBE firms only. The vendor program will allow for set-aside of specific commodity groups for bid by DMBE/DWBE firms only.

12. *Employment Goals.* A goal of 17.9% has been set for minority group employment and 6.9% for women employment on County construction contracts regardless of funding source. These levels are consistent with the levels established by the U.S. Department of Labor for this Metropolitan Statistical Area (MSA). Contractors awarded such construction projects should make every tangible good faith effort to achieve these minority and women employment goals.

13. *Complaints.* Any complaint of discrimination received by Hillsborough County concerning the MBE Program will be investigated by the Equal Opportunity Office.

14. *Prompt Payment Policy.* Every contract let by the County for the performance of work shall contain a provision requiring the prime contractor to certify in writing that all subcontractors and suppliers have been paid for work and materials from previous progress payments received (less any retainage) by the prime contractor prior to receipt of any further progress payments. During the contract and upon completion of the contract the County may request documentation to certify payment to subcontractors or suppliers. This provision in no way creates any contractual relationship between any subcontractor and the County or any liability on the County for the contractor's failure to make timely payment to the subcontractor.

15. *Citizen Participation Committee.* A Citizen Participation Committee shall be established for the purpose of relaying concerns of minority contractors and vendors,

non-minority contractors and citizens-at-large to the County about the operation of the MBE Program.

16. *MBE Program Period.* The BOCC shall annually review the MBE Program to assure achievement of its purpose while still maintaining the flexibility and viability of the County to transact its business.

17. *Waiver.* At any time prior to the advertisement for bid of a contract, the County Administrator, subject to BOCC approval, or the BOCC at any time may grant a partial or complete waiver of the MBE/DMBE requirements for any contract in which it is demonstrated that minority participation cannot be achieved as required by the MBE/DMBE Program without detriment to other considerations of the public health, safety or welfare including adverse financial impact to the County. However, when evaluating competitive bids/quotes for award in which the apparent responsible low bidder is determined to be nonresponsive to MBE requirements, the bid shall be awarded to the low bidder responsive to MBE requirements, unless the bid is more than 15% or $100,000.00, (whichever is less) of the qualified low bid without reference to MBE goals.

18. *Rescission* (sic). The provisions of the Resolution are effective immediately upon adoption and shall apply to all invitations to bid advertised after adoption of this Resolution. Invitations to bid advertised prior to adoption of this Resolution shall be governed by Hillsborough County Resolutions 84-0103, 85-1215, 86-170 and 87-0249. Within forty-five (45) days the County shall provide procedures for the full implementation of this Resolution by Executive Order(s). (Pl.Ex. 1).

14. Resolution R88-0173 has been implemented by Administrative Order 88-3, issued July 11, 1988. (Pl.Ex. 2).

15. Spencer Albert is the manager of the Minority Business Section (MBS) of the Department of Equal Opportunity and Human Relations for the County. Mr. Albert is primarily responsible for implementing the Minority Business Enterprise Program. In addition, his office is responsible for certifying "bona fide" minority businesses within the program's definition; reviewing contract bids; and monitoring minority work. (Depo. pgs. 4-5). At his deposition, Mr. Albert testified to the following facts in regard to the MBE Program:

A. The following are the steps the County utilizes in implementing the program:

1. The Goal-Setting Committee (GSC) establishes a goal for a project based on advisement from the Capital Projects Committee (CPC). The CPC sends a memorandum to the GSC notifying them that there is a project and delineating the subcontractable areas that will be provided.

a. Mr. Albert's office reviews the available and eligible minority firms to ensure that in each subcontractable area there is at least three eligible firms in each area. (Depo. pg. 7). Three is the minimum number of MBEs that must be available in a subcontract area in order to set a goal. (Depo. pg. 11).

b. From that review, the MBS establishes a recommended goal which is taken to the GSC for discussion. (Depo. pg. 7). The GSC discusses such issues as the complexity of the work and whether or not a subcontractable area is a "critical path" item. (A "critical path" item is one that the consultant,

project manager or County engineer considers essential for the general contractor to control to "ensure the project moves toward completion in a timely fashion.") (Depo. pg. 8). The goal is set by the GSC.

2. Next the project is advertised and a pre-bid conference is scheduled. The pre-bid conference provides an opportunity to contractors to ask questions regarding technical specifications; for the County to explain the bidding procedures; and for the County to explain the MBE Program requirements. (Depo. pg. 14).

3. After the bids are received by the County, the three apparently low bids are transmitted to Mr. Albert for review. The Capital Projects Department notifies those three bidders of their status and they are given five (5) days to submit to the Capital Projects Department executed minority business contract(s). Those executed contracts are then forwarded to Albert for review. (Depo. pg. 15).

4. Mr. Albert reviews the bids in two areas: 1) for compliance with Executive Order 11246 that established this geographic area as a standard metropolitan and statistical area and established hiring goals for minorities and women for skilled craft of construction (17.9% for minorities and 6.9%) for women and 2) for compliance with the MBE Program requirements. (Depo. pgs. 17, 18).

5. As to the MBE goals, Albert reviews the low bids to determine if the proposals equal or approximate the project goals and whether the executed subcontract agreements are consistent with the proposals in terms of the name of the MBE, the scope of the work, and the dollar value. If so, it is recommended that the bid be awarded. (Depo. pgs. 18, 19).

6. If the goal is not met, the good faith efforts of the low bidder are reviewed to determine if the bid is responsive (Depo. pg. 19). There are factors to be weighed in consideration and determination of whether or not the asserted good faith efforts make the bid otherwise responsive, including, but not limited to: attendance at the pre-bid conference; notification of MBEs in a given area of opportunity to bid; offer of assistance to MBEs in reviewing plans; bonding and insurance assistance; bids made in last six (6) months and their responsiveness; and whether or not bid provides all price quotations received and explanation as to why an MBE not selected. (Depo. pgs. 20, 21).

7. If the bid is determined non-responsive, (failure to meet the goal or to document good faith efforts) the bidder is notified by the Capital Projects Department and is given a set time in which to file a letter of protest to that department. (Depo. pg. 22), Protest letters are responded to by Mr. Albert and a decision is made by a Protest Committee. (Depo. pg. 23).

8. At this time, the Protest Committee reviews Article 17 of the Resolution to determine if the next low bid is fifteen percent (15%) or $100,000.00 higher than the low bidder; if so, the goal is waived and the bid is awarded to the "non-responsive" low bid. (Depo. pg. 24). If not, and if the decision as to non-responsiveness is not changed, a report, is made to the County Administrator, who makes the final decision. (Depo. pg. 23).

B. The County operates on a fiscal year from October 1 to September 30. At the time of the deposition on June 21, 1989, the County had goals set up for approximately fifty (50) projects (Depo. pg. 9).

C. The goals set ranged from zero (0%) to fifty percent (50%), which is the maximum under the Resolution. For the current fiscal year the County has two (2) projects with a zero percent (0%) goal and three (3) projects with a fifty percent (50%) goal. (Depo. pgs. 10-12).

D. For all projects where goals have been set for the current fiscal year, the total estimated value is $107,438,197.00 and the MBE participation is $21,027,976.72 or 19.6%. The overall County goal, as set by the Resolution, is twenty-five percent (25%). (Depo. pg. 13). The Board has awarded contracts valued at $79,547,904.15 and MBE contract value has totaled $12,432,047.03 or 15.6%.

E. One project goal was in the past altered, downward, as a result of a bidder's opposition to the goal as being too high. The goal had been set at twenty-three percent (23%) and was adjusted down to 13.2%. (Depo. pgs. 14, 15).

F. The Resolution provides that the goals may be waived for a particular project. A goal is waivable at the staff level by the GSC or the Board itself may waive a goal, prior to the advertisement of the project or at the time of the bid recommendation. (Depo. pg. 16). Waivers have taken place in the past at both the staff and the Board level. (Depo. pgs. 11, 15-17).

G. In the current fiscal year, of the approximately thirty-three bids reviewed by Mr. Albert, five (5) low bids have been deemed "non-responsive" at first and then found to be "responsive" because they documented their good faith efforts or because the goal was waived. (Depo. pgs. 24-27). There have not been any low bids that have

been rejected in the current fiscal year due to MBE requirements.

H. Mr. Albert testified that the City of Tampa had a similar program with a minority goal of twenty-five percent (25%) for all projects, which goal was suspended on or about March 17, 1989. (Depo. pg. 30, 31, 35). Based on the City's annual report, Mr. Albert testified that for the last fiscal year (October through September) the City achieved a twenty-one or twenty-two percent goal. (Depo. pg. 32). The City's third quarter report shows that since the goals were suspended, the percentage achieved had been 5.2 percent. (Depo. pg. 35). The figures breakdown as follows: Black 0.17%, Hispanic 4.35%, Female 0.48%, and Other 0.21%. (Def. Ex. (to Depo) 40).

CONCLUSIONS OF LAW

In order to resolve the motion for preliminary injunction, the Court must address the following issues: 1) the likelihood that the moving party will ultimately prevail on the merits of the claim; 2) the irreparable Nature of the threatened injury; 3) the potential harm that might be caused to the opposing parties or others if the order is issued; and 4) the public interest, if any. Since an injunction is an extraordinary and drastic remedy, it will not be granted unless the movant clearly carries the burden of persuasion as to all four prerequisites. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir.1983).

I. *Irreparable Injury*

Irreparable harm is distinguished from mere injury, which can be adequately compensated through the award

of money. *Id.*, at 1520. Assuming arguendo that the County's MBE program is in violation of the Equal Protection Clause of the Fourteenth Amendment, continuation of the program will result in a perpetuation and extension of the deprivation of Plaintiff's constitutional rights.

Said continuing deprivation, standing alone, is sufficient to constitute irreparable injury. It is also apparent that financial hardship with difficult and speculative money damage calculations *may* occur if the MBE program is enforced during the pendency of this case. The irreparable injury issue weighs in favor of granting a preliminary injunction.

Potential Harm to Defendants of Others

The Court does not find, and Defendants do not postulate, any potential harm to Defendants that outweighs the harm to Plaintiffs. The granting of a preliminary injunction here will not deter the County from continuing its construction projects. The injunction will prevent the present application of the MBE Resolution by the County in the awarding of construction contracts; it will not prevent the awarding of contracts per se. Nor is there any explicated potential harm to others which outweighs the harm which may occur to Plaintiffs. Therefore, the Court concludes that this factor weighs in favor of issuance of a preliminary injunction.

Public Interest

Public interest, in this Court's opinion, is always served by ascertaining and assuring that program

promulgated by legislative bodies, such as the County Commission, conform to the provisions of the United States Constitution. This factor weighs in favor of preliminary injunction herein.

Likelihood of Success on the Merits

The pivotal issue in this case is the likelihood of Plaintiffs being successful on the merits of the cause. If the Court determines that this factor weighs in favor of issuance of a preliminary injunction, the matter is resolved in favor of Plaintiffs.

II. *The Impact of City of Richmond v. Croson*

The parallels between the facts of the instant case and those of *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), are striking. In *Croson*, the Supreme Court struck down, as unconstitutional, a Minority Business Utilization Plan requiring prime contractors to subcontract 30% of the total dollar value, of each awarded city construction contract, to a Minority Business Enterprise (MBE). A careful analysis of the six opinions written in *Croson* is critical to the proper resolution of the instant dispute.

The Court has devoted considerable time and effort to reviewing the facts of the instance case and analyzing those facts in light of the *Croson* case; and, it has only been due to the ever increasing press of criminal matters that this order has not previously been issued by this Court. After spending valuable judicial time on this case, and after reviewing the *"best evidence"* brought forward

by the defendants, the Court is at a loss to understand why there has been no stipulation for entry of a preliminary injunction herein. This Court is forced to question the good faith of Defendants in opposing the efforts of Plaintiffs to suspend the MBE program of Hillsborough County, Florida.

It is very clear to the Court, from its review, that the MBE program does not meet the tests explicated by the *Croson* court. In many instances this Court could substitute the words "Hillsborough County" for the words "City of Richmond" or "Richmond" in the *Croson* decision and have a true and relevant statement. Anyone familiar with the record of this case could have, and should have, recognized the necessity for suspending the program pursuant to *Croson*, as did the City of Tampa, which Defendants' own witness, Spencer Albert, testified had a similar minority program. The Court's time and the parties' time, fees and expenses would have been better served by suspending this MBE program and working on a new program which conforms to the plurality's standards for a MBE program. The decision herein brings into question all Hillsborough County construction bids let subsequent to the issuance of *Croson* and may well result in other litigation, in this or other courts.

A. The Factual Background The Croson Plurality – Part I

In the Spring of 1983, Richmond, Virginia's City Council adopted a Minority Business Utilization Plan (the Plan). As previously noted, the Plan required prime contractors to whom the City has awarded construction contracts to subcontract no less than 30% of the total dollar

value of the contract to one or more MBE. This 30% set-aside did not apply to minority prime contractors.

Under Richmond's Plan, an MBE was defined as a business "at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." *Croson* (O'Connor opinion), at 109 S.Ct. page 713. Minority group members were defined by the City Council as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 713. (See page 673 of this opinion to compare the Hillsborough County program definition).

Though enacted by Richmond's City Council, there were no geographic limits placed on the Plan. A minority owned business from anywhere in the United States could make use of the 30% set-aside. The self-styled "remedial" plan was "enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." *Id.*, at 713. (Similarly, the Court finds no evidence that the County's program was limited geographically).

Richmond's plan included provisions for waiver of the 30% set-aside. The Director of the City's Department of General Services was to issue rules allowing waiver in situations where a prime contractor proved to the satisfaction of the Director that the requirements of the Plan could not be achieved. *Id.*, at 713. (This waiver provision is similar to the "good faith" determination made pursuant to the Hillsborough County resolution).

The Richmond City Council adopted the Plan after a public hearing. Five citizens spoke against the adoption

of the Plan; two voiced support. Advocates for the adoption of the Plan relied on a "statistical imbalance" between the percentage of Blacks in Richmond and the percentage of the City's prime construction contracts awarded to Blacks over the five year time period from 1978 to 1983: while Blacks composed 50% of the population of Richmond, they received only .67% of the prime construction contracts. *Id.*, at 714. (Again, compare the "evidence" presented in adoption of the Hillsborough County program, pages 670-673 of this opinion).

There was no direct evidence of any kind which tended to show that the City of Richmond discriminated along racial lines in the letting of contracts or that prime contractor's had discriminated against minority subcontractors. *Id.*, at 714. (Defendants here have presented *no* evidence that the County had discriminated in letting contracts and the "evidence" as to discrimination by prime contractors consisted of the conclusory statements that discrimination had occurred).

A quick review of the facts pertaining to the County's MBE program, as recited in this order, will, even to the most undiscerning eye, reveal the substantial similarity between this program and that of the Richmond Plan.

B. The Croson Plurality – Part II

Justice O'Connor wrote for the plurality in *Croson* and was joined in Part II of the opinion by Chief Justice Rehnquist and Justices White and Scalia. The plurality examined the scope of Richmond's power to adopt legislation designed to correct past discrimination.

Croson had argued, based on the Supreme Court's decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), that Richmond was bound to limit any race-based remedial effort to erasing the effects of its own discrimination. The City of Richmond contended that the Supreme Court was bound by its decision in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), asserting that Richmond had broad power to "define and attack the effects of prior discrimination" in Richmond's construction trade. The plurality could not accept either of those polar descriptions as to the scope of Richmond's authority.

Justice O'Connor distinguished *Fullilove* from the operative facts of *Croson*. In *Fullilove*, the Supreme Court upheld a minority set-aside contained in Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. Section 6701, *et seq*. Justice O'Connor brushed aside Richmond's contention that its remedial powers were as broad as those of Congress:

> What appellant ignores is that Congress unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. (emphasis in original). *Id.*, 109 S.Ct. at 719.

Justice O'Connor further addressed the issue of the difference between the powers granted to the Congress and those granted to a state or local government, by stating:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under s5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under s1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations. (cite omitted). (emphasis in original). *Id.*, at 719.

Justice O'Connor next addressed Croson's reliance on *Wygant*, in support of the proposition that Richmond could only correct the effects of its own past discrimination:

> It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. This authority must, of course, be exercised within the constraints of s1 of the Fourteenth Amendment. Our decision in *Wygant* is not to the contrary . . .

> Thus, if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. (footnote omitted). *Id.*, at 720.

The plurality opinion asserted that "as a matter of State law", a city has control over its expenditure of public funds. It may spend its money to remedy discrimination in the private sector to the extent it can identify the discrimination with sufficient particularity to satisfy the Fourteenth Amendment. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.*, at 720.

C. The Croson Plurality – Part III-A

Again writing for the plurality, Justice O'Connor was joined in Part III-A by Chief Justice Rehnquist, Justice White, and Justice Kennedy. Beginning with the observation that the rights guaranteed under Section 1 of the Fourteenth Amendment are personal rights, guaranteed to every individual, the four justices concluded that Richmond's plan denied certain individuals the right to compete for a fixed percentage of contracts based solely upon their race.

Irrespective of the racial group to which these individuals belonged, such a plan implicated their right to be treated with equal dignity and respect. Any classification based upon race must meet the rigid test of strict scrutiny, wrote Justice O'Connor, since it is often next to

impossible to discern a benign or remedial classification from an invidious or illegitimate one:

> Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *Id.*, at 721.

The plurality compared the Court's decision in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) to the *Croson* case. In *Bakke*, the University of California employed a racial quota, as to the entering class of the medical school, and reserved 16 out of 100 seats for certain minority groups. The justifications postulated for the plan included the "desire to 'reduc[e] the historic deficit of traditionally disfavored minorities in medical school and the medical profession' and the need to 'counte[r] the effects of societal discrimination.' " *Id.*, 109 S.Ct. at 722.

Five members of the *Bakke* court stated that none of the proferred interests could justify a plan that completely eliminated nonminorities from consideration of a specific portion of the opportunities for admittance in the medical school:

> Justice Powell's opinion applied heightened scrutiny under the Equal Protection Clause to the racial classification at issue. His opinion decisively rejected the first justification for the racially segregated admissions plan. The desire to have more black medical students or doctors, standing alone, was not merely insufficiently

> compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution. (cite omitted) Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphus concept of injury that may be ageless in its reach into the past." (cite omitted) He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made . . . Only then does the Government have a compelling interest in favoring one race over another. *Id.*, at 722-23.

The four plurality members of the *Croson* Court made it clear that the strict scrutiny standard is to be applied to all racial classifications, regardless of which race is disadvantaged. The argument, sometimes made, that the white majority may, consistent with the Constitution, deliberately choose to disadvantage itself was inapposite on the facts of *Croson*. The Court noted that Blacks comprised 50% of the population of Richmond, and that five of the nine City Council seats belonged to Blacks. "The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case." *Id.*, at 722.

D. The Croson Plurality – Part III-B

Part III-B of the plurality opinion, also written by Justice O'Connor, was joined by Chief Justice Rehnquist and Justices White and Kennedy. The plurality found that the factual predicate of the Richmond Plan suffered from the same defects as those found fatal to the plan outlined in *Wygant*:

> Appellant argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. Among these the city cites the exclusion of blacks from skilled construction trade unions and training programs. This past discrimination has prevented them "from following the traditional path from laborer to entrepreneur" . . . The city also lists a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record . . .
>
> It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities. *Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.* (emphasis added). *Id.*, 109 S.Ct. at 723-24.

Part III-B listed the predicate facts relied on by the District Court in *Croson*, in finding an acceptable plan in existence in Richmond, and then disabused those "facts" as being a valid basis for a race-based plan. the factors recited and rejected by the Court are as follows:

> 1. *The ordinance declared itself to be remedial.* The Court said that a mere recitation of a "benign" or legitimate purpose is entitled to little or no weight. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Id.*, at 724.
>
> 2. *Several proponents of the measure stated their views that there had been past discrimination in the construction industry.* The plurality found the statements in this regard of "little probative value in establishing identified discrimination in the Richmond construction industry." *Id.*, at 724.
>
> 3. *Minority businesses received .67% of prime contracts from the city while minorities constituted 50% of the city's population.* The plurality found that reliance on the disparity between the number of prime contracts awarded to minorities and the minority population was misplaced:
>
> > There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. (cite omitted) But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." (cite omitted) ("[T]his is not a case in which it can be assumed that all citizens are fungible

for purposes of determining whether members of a particular class have been unlawfully excluded."). *Id.*, at 725-26.

4. *There were very few minority contractors in local and state contractors' associations.* The Court stated that standing alone, this fact is not probative of any discrimination in the local construction industry. The plurality found numerous explanations for any disparity that might exist. They found that for this factor to be relevant it would have to be linked to the number of local MBEs eligible for membership. *Id.*, at 723, 726.

5. *In 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.* The plurality said that this finding from *Fullilove* was of extremely limited probative value. The opinion reiterated the parts of Part III-A which addressed the role of state or local government entities in correcting "societal discrimination." The plurality rejected the dissent's suggestion that discrimination may be "shared" from jurisdiction to jurisdiction, stating "[w]e have never approved the extrapolation of discrimination in one jurisdiction from the experience of another." *Id.*, at 727-28.

Justice O'Connor, in pronouncing the plurality opinion, stated in conclusion of Part III-B that:

> In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief"

> for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs . . .
>
> The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry . . . The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond, suggests that perhaps the city's purpose was not in fact to remedy past discrimination (emphasis in original). *Id.*, at 727-28.

E. The Croson Plurality – Part IV

Joining Justice O'Connor in Part IV, were Chief Justice Rehnquist and Justices White and Kennedy. On the question of whether or not the Richard Plan is narrowly tailored to remedy prior discrimination, the plurality finds the assessment almost impossible. The four justices do find that it does not appear that any consideration was given by the City to the use of race-neutral means for increasing MBE participation:

> Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBEs disproportionately lack capital or cannot meet bonding requirements, a race neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation. *Id.*, at 728.

Secondly, the plurality found that the 30% quota could not be said to be narrowly tailored to any goal except "perhaps outright racial balancing." The goal was based on the unrealistic assumption that minorities would choose a trade "in lockstep proportion to their representation in the local population":

> Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

F. The Croson Plurality – Part V

Justice O'Connor, joined by Chief Justice Rehnquist and Justices White, Kennedy, and Scalia, informs regarding options or opportunities available to a state or local entity in taking action to rectify the effects of "identified discrimination within its jurisdiction." These include: 1) where there is evidence of systematic exclusion of MBEs the entity may take action to end the discriminatory exclusion; 2) where there is significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors engaged by the locality or prime contractors, an inference of discriminatory exclusion could arise, and, the entity could act to dismantle the closed business system by taking appropriate action against those who discriminate (in an "extreme" case, a narrowly tailored racial preference "might be necessary"); 3) where there are individual instances of racially motivated refusal to employ minorities, an entity would be justified in penalizing the discriminator and providing

"appropriate relief" to the victim; 4) if supported by appropriate statistical proof, evidence of a pattern of individual discriminatory acts may lend support to a determination that broader remedial relief is justified; and 5) in the absence of evidence of discrimination, the entity may employ an "array of race-neutral devices" to increase accessibility to contracting by small entrepreneurs of all races including: simplification of bidding procedures; relaxation of bonding requirements; training and financial aid for disadvantaged entrepreneurs; and prohibition of discrimination in provision of credit or bonding by local suppliers and banks.

This Court acknowledges and agrees with the summary of the *Croson* decision provided by Attorney Sam A. Mackie, "Florida Minority Business Hiring," *The Florida Bar Journal* (Vol. LXIII, No. 6, June 1989):

> In summary, then, a minority-business or local-preference hiring ordinance must be founded upon specific and objective evidence concerning:
>
> 1. The nature and scope of the discriminatory injury that exists or existed;
>
> 2. The historical or antecedent causes of such discrimination;
>
> 3. The extent to which the governmental entity contributed to these causes or injuries, either by intentional acts or passive complicity in acts of discrimination by the private sector;
>
> 4. The necessity for the response adopted;
>
> 5. The duration of the response in relation to the wrong; and

> 6. The precision with which the response otherwise bore on whatever injury in fact was addressed.

What does all of this mean for the governmental legal practioner [sic], counsel to a minority business enterprise firm, and civil rights/affirmative-action defense and plaintiff's counsel in general?

Even a shallow reading of *Croson* would reveal the following:

> 1. All affirmative-action programs are now suspect, and there is no longer such a thing as "benign racial classification."
>
> 2. Preferences that favor blacks, women, and other minorities violate the civil rights of whites.
>
> 3. Racial preferences, if used at all, must be confined to reconciling specific, identifiable discrimination.
>
> 4. Federal and private set-aside programs are immune from the *Croson* obligations and guidelines.
>
> 5. Competitive bidding is, by definition, nondiscriminatory, and is, therefore, incompatible with MBE requirements, quotas, or goals.
>
> 6. If a share of a public works contract is awarded to an MBE firm, the share may *not* be based upon the number of minorities in the government entity's jurisdiction population, but only upon minority firms ready, willing, and able to work in the subcontracting area being targeted. (footnotes omitted).

G. Justice Stevens Opinion

Justice Stevens concurs in part with the plurality (specifically joining Parts I, III-B, and IV) and concurs in the judgment. Justice Stevens states he does not agree with the premise, that "seemingly underlies the plurality opinion", that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. *Croson* (Stevens opinion), at page 730. Justice Stevens emphasizes three aspects of the case which are of particular import to him: 1) the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority business enterprises; 2) the litigation involves an attempt by a legislative body, rather than a court, to fashion a remedy for past wrongs; and 3) identification of the characteristics of the advantaged and disadvantaged classes is more constructive to justify disparate treatment than engaging in a debate over the proper standard of review to apply.

H. Justice Kennedy Opinion

Justice Kennedy joins all but Part II of the opinion authored by Justice O'Connor. In his opinion Justice Kennedy concludes that a "State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." The opinion further accepts the rule announced by the plurality that "any racial preference must fact the most rigorous scrutiny by the courts."

I. Justice Scalia Opinion

Justice Scalia agrees with much of the O'Connor opinion, including the application of strict scrutiny, but disagrees with the "dicta" suggesting that state and local entities may "in some circumstances discriminate on the basis of race in order (in a broader sense) 'to ameliorate the effects of past discrimination.' " Justice Scalia states that, at least as to state or local action, "only a social emergency rising to the level of imminent danger to life and limb – for example, a prison race riot, requiring temporary segregation of inmates, (cite omitted) – can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur constitution is color-blind, and neither knows or tolerates classes among citizens.' " *Croson* (Scalia opinion), at page 735. Only where a state is acting to undo the effects of its own past discriminatory practices, does Justice Scalia find it acceptable for the State to act by race. *Id.*, at 737.

J. Dissents

Justice Marshall issued a dissenting opinion, joined by Justices Brennan and Blackmun. This dissent finds the plurality opinion to be a deliberate and giant step backwards in affirmative action jurisprudence. *Croson* (Marshall opinion), at page 740. "So long as one views Richmond's local evidence of discrimination against the backdrop of systematic nationwide racial discrimination which Congress had so painstakingly identified in this very industry, this case is readily resolved." *Id.*, at 743.

> The majority today sounds a full-scale retreat from the Court's longstanding solicitude to

> race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." (cite omitted) The new and restrictive tests it applies scuttle one city's efforts to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. *Id.*, at 757.

Justice Blackmun writes a second dissenting opinion, joined by Justice Brennan. Justice Blackmun also finds the majority opinion to be regressive.

This Court includes its detailed analysis of the respective Justice's opinions in *Croson* as a further guide to the litigants herein, as well as a contemporary roadmap for future travelers along this newly constructed pathway. The Court would also note at this point that it has taken a stand to award the female sex equal footing with other "minorities" by capitalizing the word "Women" where ever it appears in this order.

In conclusion, the Court reiterates its previous statements and concludes that Plaintiffs' motion for preliminary injunction is well-taken. Accordingly, it is

ORDERED AND ADJUDGED

1. That the Plaintiffs' motion for preliminary injunction be GRANTED. The Defendants and their representatives, agents and employees be ENJOINED from enforcing, pursuing, or taking any further action to

implement Resolution R88-1073, and concomitant Administrative Orders, or any other regulation or policy which requires or permits the allocation of Hillsborough County construction contracts, from the date of the filing of this cause of action, on a system based in whole or in part on race, color, national origin, or sex, until such time as this case is heard on the merits and until further order of this Court, and

2. This preliminary injunction is conditioned upon the Plaintiffs posting a bond in the sum of $5,000.00, conditioned that Plaintiffs shall pay to Defendants such damages as they may sustain if it is determined that this injunction was wrongfully issued.

DONE and ORDERED.

EXHIBIT A
HILLSBOROUGH COUNTY
TOTAL DOLLARS SPENT BY COUNTY WITH
MINORITY/FEMALE BUSINESSES

MINORITY/FEMALE CONTRACTORS	FY 1979-1980	*PERCENTAGE
Black Contractors	$ 7,702	.03%
Hispanic Contractors	617,230	2.24%
Female Contractors	–	–
Total Minority Contractors	$624,932	2.3%

TOTAL DOLLARS SPENT BY COUNTY OVERALL – FY 1979-80: $27,591,738

	FY 1980-81	
Black Contractors	$ 11,704	.03%
Hispanic Contractors	672,982	1.94%
Female Contractors	84,713	.24%
Total Minority Contractors	$769,399	2.2%

TOTAL DOLLARS SPENT BY COUNTY OVERALL – FY 1980-81: $34,763,999

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* Percentage is figured against total dollars spent by Hillsborough County for procurement of *goods, services and construction*. This comparison data did not include definite dollar amounts spent with White Contractors, due to information as requested not provided. (Defs. Ex. 13).

EXHIBIT B

Total bids awarded 663

Total dollar amount awarded $2,942,919.27*

Total bids awarded minority firms 42

Total dollar amount awarded minorities ...$ 44,917.25

Percentage of bids awarded to minorities.....6.3%

Percentage of dollar amount awarded to minorities (Total dollar) 1.5%

Percentage of dollar amount awarded to minorities (less large $2 million bid) 6.5%

---

* A single bid was awarded for $2,257,327.10, thereby reducing the dollar amount for the remaining bids to $685,592.10.

EXHIBIT C

STATISTICAL REPORT ON MINORITY/FEMALE BUSINESS PARTICIPATION IN HILLSBOROUGH COUNTY PROCUREMENT

County Purchases as of October 31, 1982 to July 31, 1983*

Total Purchase Orders Awarded: 11,177

Total Dollars Spent for Purchases: $24,890,246.96

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* Prior to October 31, 1982, data on MBE participation was not available by race and sex.

Distribution of Purchases Awarded by

Race/Ethnic Characteristics	Number of Purchase Orders	Percentage of Purchases
Black	101	.90%
Hispanic	578	5.17%
Women	190	1.70%
**Other Minority	13	.12%
Non-Minority	10,295	92.11%

Total Minority Participation in Purchases: 7.89%

Distribution of Dollars Spent with Minorities by Race/Ethnic Characteristics	Dollar Amount	
Black	$ 27,899.81	.11%
Hispanic	177,248.60	.71%
Women	90,675.03	.36%
**Other Minority	10,457.50	.04%
Non-Minority	24,584,038.33	98.80%

Total Dollars Spent with Minority Business: 1.22%

Statistical Source:

Statistical data obtained from monitoring logs developed for Purchasing to monitor MBE and WBE participation on continuous basis.

** Other Minority-Asian or Pacific Islander, American Indian, etc.

EXHIBIT D

Table A

POPULATION		1980 Census
Percentage		
Total Hillsborough County	646,960	
Total Minorities	164,584	25.5%
NUMBER OF BUSINESSES	1983 Data	
Total Hillsborough County*	14,417	
Total Minority	1,378	10.0%
Minority Businesses (other source)**	700	4.9%
NUMBER OF CONSTRUCTION CONTRACTORS ONLY		
Total Contractors County	2,378	
Total MBE	281	12.0%

* Data taken from records on file in the Division of Operations and Purchasing Department.

** Data taken from MBE Directory by the Office of Community Relations.

The CONE CORPORATION, et al., Plaintiffs,

v.

HILLSBOROUGH COUNTY, et al., Defendants.

No. 89-540-CIV-T-17(A).

United States District Court,
M.D. Florida,
Tampa Division.

Feb. 13, 1990.

Plaintiffs brought action challenging county's contractor set-aside program. On, inter alia, plaintiffs' renewed motion for summary judgment, the District Court, Kovachevich, J., held that county would not be permitted to "discover" evidence after the fact to show a long-standing pattern and practice of discrimination by contractors in the county so as to justify the program.

Renewed motion for summary judgment granted.

See also, D.C., 723 F.Supp. 669.

Herbert P. Schlanger, Atlanta, Ga., and Maxwell G. Battle, Jr. and R. Michael Deloach, Maxwell G. Battle, Jr., P.A., Dunedin, Fla., for plaintiffs.

Claude H. Tison, Jr. and Michael D. Malfitano, MacFarlane, Ferguson, Allison & Kelly, Tampa, Fla., for defendants.

ORDER ON MOTIONS

KOVACHEVICH, District Judge.

The cause is before the Court on Plaintiffs' renewed motion for summary judgment, filed December 29, 1989; Plaintiffs' motion for Rule 11 sanctions, filed January 3, 1990; Defendants' response to renewed motion for summary judgment, filed January 11, 1990; Defendants' response to motion for Rule 11 sanctions; Defendants' motion for stay pending appeal, filed January 23, 1990; Plaintiffs' reply to response to motion for summary judgment, filed January 25, 1990; and Plaintiffs' response to motion for stay, filed January 30, 1990.

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat v. The Miller Brewing Co.*, 708 F.2d 655 (11th Cir.1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant*, 595 F.2d 994, 996-7 (5th Cir.1979), quoting *Gross v. Southern Railroad Co.*, 414 F.2d 292 (5th Cir.1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322, 106 S.Ct. at 2552, 91 L.Ed.2d at 273.

> The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.' " *Celotex Corp.*, at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at p. 274. The Court is satisfied that Defendant has not carried its burden in opposition to the renewed motion for summary judgment.
>
> Defendants assert in response to the renewed motion for summary judgment that the discovery which they will be seeking will enable them "to show a long-standing pattern and practice of discrimination by contractors in Hillsborough County." As pointed out by Plaintiffs, they admit that they have no such information at this time:
>
> > . . . defendants do not have in their own possession documents and other evidence that would satisfy this Court's interpretation of *Croson*. (Defendants' response page one).

It is implicit in this response that Defendants did not have such information at the time the resolutions in question were passed.

The Court is in agreement with the position of Plaintiffs, as stated in their reply to Defendants' response:

> If the "remedy" of the set-aside program was created to overcome this supposed "pattern and practice of discrimination", then – since the Commission had no evidence of the existence of the "problem" at the time they implemented the "remedy" – the "remedy" could not possibly have been a "narrowly tailored" solution. The Commission was not aware of the parameters of the problem (since it lacked a factual basis), so it

> could not possibly have tailored the remedy narrowly.

The Court cannot permit Defendants to "discover" evidence after the fact to support the legislative action of passing the resolutions at issue. "The findings that *Croson* requires are legislative, and implicitly must precede the legislative act . . . The findings cannot be supplied . . . at a later time when the legislative act is challenged in court." *Cone Corp. v. FDOT,* Case No. TCA 88-40042-WS (N.D.Fla. 1989). The Court, therefore, concludes that the renewed motion for summary judgment should be granted.

The Court having reviewed the remaining motions, motion for Rule 11 sanctions and motion for stay pending appeal, determines that neither motion should be granted. Accordingly, it is

ORDERED that the motion for Rule 11 sanctions and motion for stay pending appeal be denied, the renewed motion for summary judgment be granted, and Plaintiffs shall have ten (10) days from this date in which to submit to the Court a proposed final summary judgment, in its favor, for the Court's signature.

DONE and ORDERED.

PLAINTIFF'S EXHIBIT No. 1

Text of Hillsborough County Resolution No. R88-0173

RESOLUTION NO. R88-0173

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY, FLORIDA, ESTABLISHING A MINORITY BUSINESS ENTERPRISE PROGRAM FOR ALL CONTRACTS FOR CONSTRUCTION, PURCHASES OF GOODS AND SERVICES, AND/OR THE PROVISION OF CONSULTING SERVICES AND SUPERSEDING RESOLUTIONS 84-0103, 83-0215, 86-0170 AND 87-0249 FOR THOSE PROJECTS ADVERTISED FOR BID AFTER ITS ADOPTION.

Upon motion by Commissioner Colson, seconded by Commissioner Poe, the following resolution was adopted by a vote of 4 to 1; Commissioner(s) Talley voting "No."

WHEREAS, the Hillsborough County Board of County Commissioners (BOCC) has reviewed historical statistical data regarding the expenditure of funds to minority business enterprises, disadvantaged minority business enterprises, disadvantaged women business enterprises (MBE/DMBE/DWBE) as defined by Hillsborough County in comparison to the total expenditure of funds in Hillsborough County's procurement program; and

WHEREAS, based upon the aforementioned data, the BOCC finds that such business enterprises have been disproportionately under-represented as participants in and recipients of Hillsborough County's procurement program involving contracts for materials, supplies and/

or the provision of consulting and construction services to the County; and

WHEREAS, the BOCC recognizes its obligations to ensure that its contracting practices and contracting practices of its contractors and subcontractors provide a full and equitable opportunity, through affirmative action, to MBE, DMBE and DWBE firms; and

WHEREAS, the BOCC had reaffirmed its commitment to Equal Employment Opportunity and Affirmative Action.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF HILLSBOROUGH COUNTY, assembled this 29th day of June, 1988, as follows:

1. *Policy*. It is the policy of the Hillsborough County Board of County Commissioners that MBE/DMBE/DWBEs shall have the maximum opportunity to participate in the County's procurement programs and to encourage such participation by such business enterprises.

2. *Objectives*. The objectives of the MBE Program are to take specific affirmative action to eliminate discrimination and the effects thereof, to ensure that construction contractors and subcontractors provide equal opportunity through employment of minorities and women, and to increase participation by minority businesses in all procurement activities.

3. *Applicability*. This resolution shall apply to all procurement activities under the Hillsborough County Board of County Commissioners.

4. *Appendix*. The attached document marked "Appendix A" is incorporated as a part hereof by this reference.

5. *Definitions*. Definitions are included in the appendix to this resolution.

6. *Discrimination Prohibited*. No person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any Hillsborough County procurement action on the grounds of race, color, national origin, or sex.

7. *Program Administration*. The County Administrator has the general responsibility for administering the MBE Program and implementing the BOCC's Policy. The Equal Opportunity & Human Relations Department Director shall be responsible for developing, managing, and implementing the MBE Program on a day-to-day basis; and such other responsibilities as are set forth in this Resolution. The County Administrator may promulgate such administrative procedures consistent with this Resolution or any Federal or State law, regulation or grant requirement. In addition, for those projects which are in whole or in part funded by federal grants the County Administrator shall amend administrative procedures to be consistent with amendments to the pertinent Federal grant regulations or laws.

8. *Procedures to Ensure that MBE's Have an Equitable Opportunity to Compete for Contracts and Subcontracts*. The County shall use the following techniques to facilitate MBE participation in contracting activities:

a. The County will arrange adequate time for the submission of bids and bid specifications so as to facilitate the participation of MBE/DMBE/DWBEs.

b. The County, to the extent economically and legally feasible, will break down the scope of large projects into smaller contractual parts to facilitate the participation of smaller businesses.

c. The County will hold seminars or workshops periodically to acquaint the minority business community with the requirements and scope of its procurement activities. These efforts will be coordinated with organizations that are familiar with and willing to reduce problems experienced by MBE/DMBE/DWBEs.

d. The County will review and evaluate for certification those applicants for the MBE Program. This review will include all documentation necessary to establish the legitimacy of the applicants' firm. Only those businesses certified by Hillsborough County by the time of bid opening, will be counted toward goal attainment.

e. The County will provide contracting opportunities for professional services pursuant to Section 287.055 Florida Statutes, known as the "Consultant's Competitive Negotiation Act" as well as other professional services solicited through the competitive bid or Request for Proposal process. MBE Program procedures will be included in each solicitation.

f. The County will apply appropriate penalties to bidders who fail to perform properly by commission or omission, of acts of a serious nature that violate the intent of the

MBE Program and other relevant Federal and State laws.

g. All bid specifications will require prime contractors to make good faith efforts to utilize MBE/DMBE/DWBEs.

h. All prime contractors will be required to complete documentation listing all minority contractors contacted; giving the results thereof.

9. *Directory*. The County shall have available resources, including directories or lists, to facilitate in the identification of County certified MBE/DMBE/DWBEs whose skills are needed in the performance of County contracts. The County shall make such resources available to bidders in their efforts to meet the MBE Program requirements.

10. *Overall Goal*. The County hereby establishes an annual goal of twenty-five percent (25%) for the MBE Program. This goal applies to all construction related procurement on projects that are $100,000 and above. There is a 5% goal for nondisadvantaged minority business enterprises (MBEs) and a 20% goal for disadvantaged minority and disadvantaged women business enterprises (DMBEs/DWBEs). Where possible, the desired breakdown of the MBE/DMBE/DWBE participation should reflect 18% of the contract price being provided to DMBEs and 2% to DWBEs. Target percentage are as shown:

MBE (NonDisadvantaged) – 5% goal

DMBEs/DWBEs – 20% goal

Black	10%
Hispanic	7%
Women	2%
Other	1%

A five percent (5%) annual goal is established for purchase of goods and services under vendor program and a five percent (5%) annual goal is established for consultant services contracts.

The County will establish goals for MBE/DMBE/DWBE participation on a project by project basis. However, goals established for an individual project shall not exceed fifty percent (50%).

11. *Set-Aside.* The County will provide a set-aside provision whereby specific projects in an estimated amount of $100,000.00 or less may be available for bid by DMBE/DWBE firms only. The vendor program will allow for set-aside of specific commodity groups for bid by DMBE/DWBE firms only.

12. *Employment Goals.* A goal of 17.9% has been set for minority group employment and 6.9% for women employment on County construction contracts regardless of funding source. These levels are consistent with the levels established by the U.S. Department of Labor for this Metropolitan Statistical Area (MSA). Contractors awarded such construction projects should make every tangible good faith effort to achieve these minority and women employment goals.

13. *Complaints.* Any complaint of discrimination received by Hillsborough County concerning the MBE Program will be investigated by the Equal Opportunity Office.

14. *Prompt Payment Policy.* Every contract let by the County for the performance of work shall contain a provision requiring the

prime contractor to certify in writing that all subcontractors and suppliers have been paid for work and materials from previous progress payments received (less any retainage) by the prime contractor prior to receipt of any further progress payments. During the contract and upon completion of the contract the County may request documentation to certify payment to subcontractors or suppliers. This provision in no way creates any contractural [sic] relationship between any subcontractor and the County or any liability on the County for the contractor's failure to make timely payment to the subcontractor.

15. *Citizen Participation Committee.* A Citizen Participation Committee shall be established for the purpose of relaying concerns of minority contractors and vendors, nonminority contractors and citizens-at-large to the County about the operation of the MBE Program.

16. *MBE Program Period.* The BOCC shall annually review the MBE Program to assure achievement of its purpose while still maintaining the flexibility and viability of the County to transact its business.

17. *Waiver.* At any time prior to the advertisement for bid of a contract, the County Administrator, subject to BOCC approval, or the BOCC at any time may grant a partial or complete waiver of the MBE/DMBE requirements for any contract in which it is demonstrated that minority participation cannot be achieved as required by the MBE/DMBE Program without detriment to other considerations of the public health, safety or welfare including adverse financial impact to the County. However, when

evaluating competitive bids/quotes for award in which the apparent responsible low bidder is determined to be nonresponsive to MBE requirements, the bid shall be awarded to the low bidder responsive to MBE requirements, unless the bid is more than 15% or $100,000.00, (whichever is less) of the qualified low bid without reference to MBE goals.

18. *Recission [sic].* The provisions of this Resolution are effective immediately upon adoption and shall apply to all invitations to bid advertised after adoption of this Resolution. Invitations to bid advertised prior to adoption of this Resolution shall be governed by Hillsborough County Resolutions 84-0103, 85-0215, 86-0170 and 87-0249. Within forty-five (45) days the County Administrator shall provide procedures for the full implementation of this Resolution by Executive Order(s).

APPENDIX A - DEFINITIONS

1. *Affirmative Action* – Remedial steps taken to correct past and present practices of discrimination and their current effects in order to attain equal opportunity.

2. *Business Enterprise* – Any legal entity, other than a "joint venture", which is organized in any form (i.e., sole proprietorship, partnership, corporation etc.) to engage in lawful commercial transactions.

3. *Certification* – The verification of the authenticity of a minority or woman-owned business enterprise to determine eligibility for participation under the County's MBE Program as required by state statutes and the County's Program.

4. *Commercially Useful Function* – A function which results in the provision of materials, supplies, equipment, or services to customers other than governmental entities. Acting as a conduit to transfer funds to a non-minority business does not constitute a commercially useful function.

5. *Construction* – The process of building, altering, repairing, improving, or demolishing any public structure, building, roadway, or other public improvements or any kind to public real property.

6. *Contract* – All types of County agreements, regardless of what they may be called, for the purchase of supplies, materials, services or the performance of construction.

7. *Contractor* – Any person, firm, partnership, corporation, agency or other organization, who in any capacity undertakes or offers to undertake or purports to have the capacity to undertake, or accepts an order or contract to construct, alter, repair, add to, subtract from, or improve any building or other structure, project or improvement or to do any part thereof, including building, plumbing, electrical, mechanical and gas system work, and to include any person who for a salary, fixed fee, wages by the day, or for any other compensation, agrees with the owner, agent or lessee of any property to do any of the foregoing, or have the same done when any part of such shall be compensation for the supervision, direction or inspection, (but shall not include any person employed by an owner, agent or lessee to perform labor only under the direction of the owner, agent or lessee; and shall include subcontractors subject to

such specific provisions as to subcontractors as herein provided): but shall not include an authorized representative of the United States Government or the State, or any political subdivision thereof. Further, the term "contractor" shall include an individual who undertakes alone to do the work of a contractor.

8. *Control* – Having the primary power, direct or indirect, to influence the management of a business enterprise. The controlling party must have the demonstrable ability to make independent and unilateral business decisions on a day to day basis, as well as the independent and unilateral ability to make decisions which may influence and chart the future destiny of the enterprise.

9. *County* – All references to County or Hillsborough County relates only to functions and responsibilities of the Board of County Commissioners.

10. *Days* – All references to days will be those days recognized by Hillsborough County BOCC as working days. Working days normally exclude weekends and holidays. Normal working hours are from 8:00 a.m. through 5:00 p.m.

11. *Disadvantaged Minority Business (DMBE)* – A small, socially and economically disadvantaged enterprise, other than a joint venture, that is at least fifty-one percent (51%) owned and controlled by one or more minority persons; or in the case of publicly owned businesses, at least fifty-one percent (51%) of the stock is owned by minority group members. the business enterprise must also meet the requirements for designation as a Small Business Enterprise; that is, it must be a business with a staff of

twenty-five (25) employees or less whose annual gross sales in construction is $3,000,000.00 or less. In addition, the small business enterprise must be designated as "socially" disadvantaged, that is, an enterprise whose social disadvantage stems from the owner's minority group membership. For the purpose of this program, all applicants for certification as bona fide DMBE/DWBE must be business entities which provide a commercially useful function.

12. *Disadvantaged Women Business Enterprise (DWBE)* – Is defined as above, except that it applies to women.

13. *Economically Disadvantaged* – Those organizations whose staff levels and annual gross sales meet the definition of a small business enterprise as defined by this program.

14. *Joint Venture* – An association of two or more persons, partnerships, corporations, or any combination thereof formed to carry on a single business activity which is limited in scope and duration. For the purpose of this program only bona fide joint ventures certified in accordance with Hillsborough County procedures shall be considered a minority business enterprise.

15. *Licensee* – A holder of a certificate issued pursuant to Florida Statutes or local Hillsborough County ordinance, or a person registered pursuant to Florida or local Statutes.

16. *Minority Business Enterprise (MBE)* – A business enterprise which is: 1) certified as a bona fide minority business by Hillsborough County; and 2) an independent business concern that is at least fifty-one

percent (51%) owned and controlled by minority group member(s).

17. *Minority Group Members* – Member(s) or individual(s) who are citizens or lawful permanent residents of the United States and who are Black (not of Hispanic Origin), Hispanic, American Indian, Alaskan Native, Asian, or Pacific Islander. *Women are considered as minority group members for purposes of this program.*

    a. Black – a person having origins in any of the black racial groups of Africa.

    b. Hispanics – a person of Spanish or Portuguese culture with origins in Mexico, South America, Central America, or the Caribbean Islands, regardless of race.

    c. Asian – a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.

    d. American Indian or Alaskan Native – a person having origins in any of the original peoples of North America.

    e. Woman – For purposes of this program, women are considered as minority group members.

18. *MBE/DMBE/DWBE Enterprise Directory* – A compilation of certified MBE/DMBE/DWBE minority businesses retained and published by the County and made available to contractor(s) for use in identifying subcontractors, material suppliers etc.

19. *Services* – The furnishing of labor, time, or effort by a contractor. This term includes "professional services", as defined in Florida Statutes Section 287.055 "Consultant's

Competitive Negotiation Act" and apply to construction contracts of less than $100,000.00.

20. *Shall/May* – "Shall" is mandatory, whereas "may" is permissive.

21. *Small Business Enterprise* – Any business with a staff of twenty-five (25) employees or less whose annual gross sales in commodities and/or services, labor and materials is $500,000.00 or less, or whose annual gross sales in construction is $3,000,000.00 or less.

22. *Socially Disadvantaged* – A small business enterprise as defined in "21" above whose social disadvantage stems from the owner's minority group membership.

23. *Subcontractor* – A business enterprise that contracts to fulfill a part or the whole of a contract made by a principal contractor.

24. *Supplier* – A business that performs a commercially useful function within normal industry practices. A bona fide supplier is an established business that maintains a store and an inventory, sells goods to the public or a number of contractors, and carries, packages, and ships goods manufactured by a number of different companies.

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, RICHARD L. AKE, Clerk of Circuit Court and Ex Officio Clerk of the Board of County Commissioners of Hillsborough County, Florida, do hereby certify that the above and foregoing is a true and correct copy of a resolution adopted by the Board at its special meeting of June 29, 1988 as the same appears in record in Minute Book 145 of the Public Records of Hillsborough County, Florida.

WITNESS my hand and official seal this 8th day of July, 1988.

RICHARD L. AKE
CLERK OF CIRCUIT COURT

By: /s/ Edna L. Fitzpatrick
Deputy Clerk

APPROVED BY COUNTY ATTORNEY

BY /s/ Silvia Patrick
Approved As To Form And
Legal Sufficiency.

(2)

No. 90-587

In The

Supreme Court of the United States

October Term, 1990

THE CONE CORPORATION, et al.,

Petitioners,

v.

HILLSBOROUGH COUNTY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. a. Has a county demonstrated a "compelling interest" sufficient to implement a race-conscious program in local construction contracts when, after six years of experience with a voluntary race-neutral program, it finds

   i. Continuing gross disparities between the availability of local minority and female contractors and the amount of public contract and sub-contact work reaching them;

   ii. Agency complaints of race and sex discrimination by local contractors in awarding subcontracts, and fraud in connection with federal programs; and

   iii. A high volume of citizen complaints of race and sex discrimination by local contractors, with many such complaints being documented by county investigators?

   b. Is "strict judicial scrutiny" properly applied, as required by *City of Richmond v. J. A. Croson Company*, 488 U.S. ___, 102 L.Ed.2d 854 (1989), when a court permits a county to implement a race-conscious program based on such evidence?

2. Have petitioners demonstrated, or does the record otherwise show, that the object of Hillsborough County's minority business enterprise law is to rectify a statistical disparity rather than, as it states and the Court of Appeals found, to eliminate existing race and sex discrimination in the local construction industry?

3. Does *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L.Ed.2d 733 (1989) have any bearing on a local government's demonstration of need for race-conscious measures, when it relies on the evidence cited in question 1 above?

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Does *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. ___, 111 L.Ed.2d 445 (1990) have any bearing on the evaluation of a state or local race-conscious program, and did the Court of Appeals *sub silentio* rely on it in finding that Hillsborough County had made an adequate showing of need?

5. Have Petitioners demonstrated, or does the record otherwise show, that Hillsborough County failed to consider and implement race-neutral measures before resorting to a race-conscious program?

6. Does this record present any issue regarding the continuing need for a race-conscious program in Hillsborough County, when such issue was not referred to by the Court of Appeals or presented by the parties?

LIST OF PARTIES AND INTERESTED PERSONS

Subsequent to the decision of the Court of Appeals, Larry J. Brown resigned as County Administrator of Hillsborough County and was succeeded in that office by Frederick B. Karl. A motion to substitute Mr. Karl for Mr. Brown as a respondent is being filed concurrently herewith. Except as stated above, the list of interested parties in the Petition for Certiorari identifies all parties known to Respondents.

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STATEMENT OF THE CASE

The parties agree that Hillsborough County, Florida has a long history of pervasive official and private discrimination, directed primarily against blacks but also against other minorities and women. The parties further agree that in the mid-1970's Hillsborough County began, under some prodding by federal agencies, to consider the effect of this discrimination on the local construction industry, whether it continued, and what to do about it. Beyond that point, however, which is reached after the first paragraph of petitioners' Statement of the Case, respondents disagree with virtually all of the rest, including petitioners' description of the evidence on the basis of which the Court of Appeals acted, the nature and history of the race-neutral program in effect in Hillsborough County from 1978 through 1984, the issues presented to and the holding of the Court of Appeals, and even the procedural history of the case. Respondents therefore submit the following Statement of the Case, in which petitioners' specific misstatements will be identified as they appear.

It will constitute sufficient discussion of Hillsborough County's legacy of discrimination to note that the County Courthouse, built in 1960, originally had separate "white" and "colored" rest rooms and water fountains, and that it was not until 1976 that Hillsborough County officially adopted a policy of non-discrimination in governmental action. (R. 4, Gilder, pp. 9-10; Plft. Ex. 23). Before this policy was adopted Hillsborough County knew nothing about the nature and condition of minority

business, or the extent to which public contract and procurement expenditures were reaching the minority business community, except that there was a general sense that minorities, and particularly blacks, were not doing business with the County or on County contracts. (R. 4, Gilder, pp. 8-9, 22). The policy was simply a statement of purpose.

Between 1976 and 1978 Hillsborough County began to receive evidence confirming the impression that blacks and other minorities were shut out of County business. Among others, the Environmental Protection Agency warned the County in 1977 that discrimination existed in federally funded local projects and that to comply with its obligation as a grantee it must take affirmative steps to insure contractor compliance with minority participation requirements. What statistics the County had regarding minority and female participation in County business, though sketchy, indicated that blacks were getting virtually none, and Hispanics and women were significantly under-represented. (Deft. Ex. 3, 13).

In 1978 Hillsborough County adopted a minority and female business enterprise program, which aimed to encourage and facilitate minority and female representation in public expenditures. It contained no affirmative race-conscious requirement, depending entirely on voluntary action by contracting agencies and general contractors. The program addressed many areas, including procurement and bidding policies, which were overhauled to facilitate bidding by small business concerns; outreach, education, and liaison programs to help minority businesses become knowledgeable about business

opportunities and bidding practices, and to increase contact between the white and minority business communities; and monitoring programs to find out what the extent of minority and female participation really was.[1] The program was administered by the Hillsborough County Equal Opportunity Office. (R. 3/10-12, 35-38, Deft. Ex. 18, 19, 32).

The record does not support, and in fact refutes, petitioners' statement that the 1978 program was "never funded, implemented, or enforced". (Petition at 3). Petitioners cite two exhibits, a 1981 memorandum to the County Administrator from Robert Saunders, Director of the Equal Opportunity Office, and a 1982 memorandum

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[1] The statement at page 3 of the Petition that a Labor Department study of the City of Tampa "found no discrimination which affected minority or female businesses in the construction industry" is, if literally true, grossly misleading. The study made no finding concerning discrimination; it simply surveyed the general condition of minority business in Tampa. It did not opine on whether minority businesses were being discriminated against by prime contractors or by the County. It did find, however, that minority businesses as a class suffered from a number of institutional disadvantages relative to white businesses, including lack of access to capital, more bonding difficulties, and the like. Significantly, it traced these current difficulties to past institutional and private discrimination. Before the 1964 Civil Rights Act the minority business community was limited to the minority population for custom. As a result, minority businesses adapted to the needs of their only customers, requiring that they be smaller companies specializing in smaller jobs, labor rather than capital-intensive. The Civil Rights Act released their captive market but left them unable to compete in the non-minority and public markets, because of the very characteristics they had developed to serve the minority market. (Deft. Ex. 11).

to Mr. Saunders from his deputy, Jacqueline Barr. Saunders' memorandum complained that his office was not being given sufficient "resources" to accomplish its objectives. The context discloses that he was referring to legislative, not financial, resources. He complained that in three years there had been no improvement in minority participation and urged that enforceable race-conscious participation goals be adopted. The 1982 memorandum discusses the evidence of four years regarding both contractor and County procurement performance. The statement (Petition at 22) that Ms. Barr concluded "that there is little or no effort to properly implement the existing policy for minority/female participation aggressively" was part of a criticism of County procurement agencies, which operated on their own and had not shown significant improvement. Ms. Barr also reported that the outlook for voluntary contractor compliance was dismal. Because the County could not collect information on minority participation in sub-contracts,[2] it surveyed a sample of prime contractors about their use of and contacts with minority subcontractors. Only three of twenty had accepted a quote from, or even contacted, any minority subcontractor. She concluded that vigorous attempts to produce results from the 1978 program had failed, and

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[2] The County's efforts to obtain information from white contractors about their use of minority and female subcontractors relied on voluntary completion by prime contractors of a subcontractor identification form in the contract documents. Most prime contractors did not even fill it out. Those that did invariably acknowledged using no black, and almost no Hispanic or female, subcontractors in the contracts being bid. (R. 3/12-13, 66-67).

that nothing short of enforceable race-conscious goals could succeed. Two years later, after extensive inquiry, the Board of County Commissioners agreed, adopting the predecessor to the law at issue. (Pl. Ex. 21).

Between 1978 and 1984 Hillsborough County was besieged with complaints of discrimination by both County agencies and prime contractors against blacks, Hispanics, and women. The commissioners received literally hundreds of constituent complaints; private and federal agencies also complained of discrimination. (R. 4, Bing, pp. 5-8, 12; Gilder, 13-16, 23-26). The discriminatory practices complained of included bid shopping (disclosing a minority subcontractor's quote to a white subcontractor and asking him to beat it); assisting white, but not black, subcontractors in obtaining bonding; refusal by suppliers to quote to minority businesses, or quoting higher prices to them; and use by prime contractors of minority "fronts" on federal projects. (R. 3/10-12, 32-38, 46-47; Deft. Ex. 18, 19, 32, 36). Hillsborough County had to re-advertise or accept higher bids on projects where low bidders had used minority "front" enterprises, and to establish procedures to police against the practice.

Many individual complaints of discrimination were referred by commissioners to the Equal Employment Office, which investigated as many as it could and found many that appeared well-grounded. (R. 3/33-34). This was as far as the agency could go. It possessed no enforcement powers, either through litigation or administrative proceedings, against a prime contractor who committed a particular act of discrimination.

Hillsborough County also conducted a detailed census of local businesses that were potential bidders for County contracts or sub-contracts or suppliers of goods and services, identifying each business by the race and sex of its controlling person or persons and by product or service supplied. (Deft. Ex. 28). The census, completed in 1984, showed that minority and female owned businesses constituted a substantial but unrepresented portion of the Hillsborough County business community as a whole. Out of 14,417 potential vendors, minority businesses constituted 1,378 (10%) and female-owned businesses 712 (5%). Minority representation among construction contractors was even higher, with minority contractors constituting 281 out of 2,378 (12%) and female contractors 112 (5%). By this time enough statistics had been complied about minority and female participation in the process and their representation in the business community. Total minority and female participation was less than 4% of total contract value. Most of this was received by Hispanic subcontractors, who were still under-represented by 4-1; black businesses did much worse, with 6% of the contractors getting less than 0.1% of the business, a 60-1 disparity. (Deft. Ex. 13, 31).

All of this information was presented to the County Commission, and discussed by it, on many occasions in 1983 and 1984 in public meetings and special workshops. The Commissioners included three white men, a white woman, and a black man (the first ever to hold county-wide office). The Commission had responded to the Equal Opportunity Office reports between 1981 and 1983 by requesting further study and increased efforts; on June

20, 1984, six years after the voluntary program was inaugurated, the County Commissioners voted 4-1 to adopt a minority business program containing enforceable goals for minority and female participation. Affirmative votes were cast by the three white male commissioners, each of whom placed himself on record before the vote as having been convinced by the evidence that race and sex discrimination had been, and was still being, practiced by prime contractors in Hillsborough County, and that an enforceable race-conscious program was needed to stop it. (Deft. Ex. 27).

Since 1984 the Commission has reconsidered and reenacted the law each year, making many substantive and procedural revisions. The current version, Resolution No. R88-0173, which is at issue here, appears in the Appendix to the Petition. Because petitioners raise issues about the substantive validity of the law, as well as about the need for race-conscious legislation, some discussion of its key features is required.

At the heart of the program is the County's directory of certified minority and female-owned businesses. The directory serves three purposes: 1) to screen businesses claiming to be owned and controlled by minorities and females to establish their *bona fides* and prevent the use of minority front enterprises; 2) to effectively identify to prime contractors those potential minority and female subcontractors who engage in the specialties they need; and 3) to serve as the basis for setting minority participation goals on all County contracts. Although the resolution contains a precatory county-wide goal of 25% for minority/female participation, actual participation goals

are set individually for each project, based on the availability of certified minority/female businesses engaged in the particular trades required for the work. Before any component of a contract can be included in the project goal it must be found to be subcontractable, and the directory must identify at least three certified minority/female subcontractors who provide the product or service required. No project goal may exceed 50%. Individual project goals have ranged between 50% and zero. The aggregate minority and female participation goals for projects advertised in fiscal year 1988-89 was 19.6%, closely approximating their representation in the pool of potential subcontractors in the 1983 census. (R. 4, Albert, pp. 7-13).

A bid is deemed "responsive" to minority participation specifications if the bidder shows either that he will meet his project goal or that, notwithstanding his failure to do so, he used good faith efforts to solicit and do business with minority/female subcontractors.[3] If the low bidder is found responsive, he is awarded the contract; if non-responsive, the contract is awarded to the next lowest responsive bidder, unless the lowest responsive bid exceeds the low bid by $100,000 or 15%. In fiscal year 1988-1989, through the date of hearing in the District Court, the County had evaluated bids on 33 projects. In 28 cases, including five where project goals had not been met, the low bidder was found responsive and was

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[3] The implementing regulation furnishing the guidelines for evaluating good-faith efforts is reproduced in the Appendix to this Brief.

awarded the contract without further proceedings. (R. 4, Albert, pp. 16-25).

A bidder found non-responsive has a right to appeal to the Protest Committee and to the Board of County Commissioners. Of the five low bids in 1988-89 initially found non-responsive, two were found responsive on appeal, one by the Protest Committee and one by the Board. In the three remaining cases, where the low bidders either did not appeal or appealed unsuccessfully, each low bidder received the contract despite a finding of non-responsiveness, each having under-bid responsive bidders by more than the amount of the bid credit. Thus, during the life of the current program, there has been no occasion when the lowest otherwise qualified bidder failed to receive the contract on account of it. Yet, despite its failure to divert any contract from a low bidder or cause any other injury identified by petitioners, the program had, in only four years, increased minority and female participation in County contracts from under 4% to 15.6%, almost equal to their representation in the local business community as indicated by the 1983 census.[4] (R. 4, Albert, pp. 25-29).

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[4] At page 23 the Petition states that minority participation had reached 19.6% by 1989, slightly higher than the percentage of minorities in the business community. The 19.6% figure, although taken from the opinion of the Court of Appeals, is inaccurate, as petitioners know. The correct figure is 15.6%. The 19.6% figure represents not minority/female participation in contracts awarded but minority/female goals set before the projects were advertised for bid. The foregoing is undisputed in the record. The figures for actual participation and initial

(Continued on following page)

On April 18, 1989 petitioners, who are general contractors doing business in Hillsborough County, commenced this action in the United States District Court for the Middle District of Florida, claiming that Resolution R.88-0173 denies them the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Petitioners did not allege that they, or any of them, had been adversely affected by the operation of the law in any identifiable way, by loss of contracts or otherwise. Petitioners' statements about discovery and the District Court's reception and review of evidence (pages 5-6) are inaccurate. The District Court set a hearing for May 2, 1989 on petitioners' motion for preliminary injunction, at which it scheduled briefs on the legal issues before taking evidence at a hearing on June 16, 1989. During this period no discovery was undertaken, except that the County made available to petitioners all of its files and records relating to the minority business program, on the understanding that it would have the burden of showing its justification. Respondents prepared to present evidence that would fit into a one-day hearing from their own resources; no question of discovery arose.

(Continued from previous page)

goals appear to have become transposed in the opinion of the Court of Appeals. In fact, the 19.6% figure was correctly referred to in the body of the Court of Appeals' opinion as a "working goal". 908 F.2d at 917.

The significance of the figures *per se* will be discussed in Argument. For present purposes we merely observe that petitioners' knowing reliance on an incorrectly stated statistic epitomizes their approach to the record as a whole.

On June 16, after one witness had testified, the Court announced that it had no more time for evidence because of other business and could not reconvene the hearing without substantial delay. This resulted in an agreement to take the testimony of the remaining witnesses before a court reporter and to submit transcripts and written argument to the District Court. (R. 3/69-70). This was done; the transcripts that appear in the record in deposition form (R. 4) are actually a substitute for the live testimony of the witnesses who were to have testified on June 16. From that point until after the District Court issued the preliminary injunction, neither side sought discovery.

On October 16, 1989 the District Court entered an order granting the motion for preliminary injunction, holding that plaintiffs had shown a likelihood of irreparable injury resulting from the operation of the program, despite their failure to claim any identifiable economic injury, because "continuation of the program will result in a perpetuation and extension of the deprivation of Plaintiff's constitutional rights." 723 F.Supp. 669, 678, and holding on the merits that the program violated plaintiffs' Fourteenth Amendment rights both because the County had failed to show a need for race-conscious measures and because the substantive provisions of the law were not narrowly tailored to meet the objective of correcting discrimination. Petitioners moved for summary final judgment on October 18 and December 28, 1989, asserting that the only evidence that could be presented in support of the program was that which had been before the County Commission at the time it was adopted in 1984, and that no discovery should be allowed. On February 12, 1990 the District Court agreed,

entering final judgment for petitioners based on the record previously compiled. The appeals taken by respondents from these Orders were consolidated by the Court of Appeals for argument and disposition.

Respondents filed motions in the District Court and in the Court of Appeals to stay the injunctions pending appeal, based in part on evidence showing that the white business community had reacted to the injunction by sharply reducing their business with minority contractors and ceasing altogether to do business with black contractors. Minority and female participation in bids submitted after October 16, 1989 went from 15.6% to 4.97%, equally divided between females and Hispanics; black participation dropped from 6.81% to zero.[5] The Court of Appeals stayed the injunctions on March 22, 1990.

On August 13, 1990 the Court of Appeals issued its opinion reversing the District Court's orders. It held that the evidence accumulated by Hillsborough County throughout six years of operating a voluntary race-neutral program established a *prima facie* case of discrimination in the local construction industry supporting its conclusion that race-conscious remedial measures were

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[5] This paralleled the experience of the City of Tampa, which had suspended its minority business program on March 17, 1989, with the following result (Deft. Ex. 39, 40):

	Before March 17	After March 17
Black	7.96%	0.17%
Hispanic	12.31%	4.35%
Female	0.66%	0.48%
Other	0.19%	0.21%
Total	21.13%	5.21%

required, and that the law was narrowly drawn to achieve its objective while minimizing any burdens imposed on petitioners or the white contracting community as a whole. The case was remanded to the District Court for further proceedings.

ARGUMENT

REASONS FOR DENIAL OF THE WRIT.

This case does not present the issues claimed by petitioners. Their attempt to portray Hillsborough County's law and its history as identical to the legislative record and product this Court considered in *City of Richmond v. J. A. Croson Company*, 488 U.S. ___, 102 L.Ed.2d 854 (1989), and to portray the Court of Appeals as indifferent or hostile to this Court's judgments, misstates both the record and the holding of the Court of Appeals. Petitioners' hidden major premise is that *Croson* outlawed all racially-conscious state and local affirmative action programs. To them there is no difference between the two hours Richmond spent considering discrimination and the six years Hillsborough County spent studying the subject; no delay could be long enough. No disparity in the distribution of public contract dollars, however gross or for how long sustained, could justify the Commission in concluding that there was discrimination. Petitioners view *Croson*'s explanation of the Richmond law's deficiencies as window-dressing; to them the decision is not a statement of principles applied to facts but a policy statement that discrimination is conclusively presumed to have ended.

Croson holds that the same standards of scrutiny apply to race-conscious legislation whether its classifications are called benign or invidious, remedial or vindictive. Strict scrutiny applies to contract preferences as well as to miscegenation laws. The Court of Appeals accepted and applied that principle. This case presents no issue worthy of the Court's consideration, since the record demonstrates that Hillsborough County's program is, on any material point of comparison, the polar opposite of the program considered in *Croson*. Respondents submit that the decision below is so plainly correct that the Court may consider summary affirmance under Supreme Court Rule 16.1 as an appropriate disposition of the Petition. We turn to the specific issues petitioners claim to present.

1. The Court of Appeals properly applied "strict scrutiny."

Petitioners accuse the Court of Appeals of pretending to apply strict scrutiny in reviewing Hillsborough County's minority business program but actually giving it only cursory review, and of searching through *Croson* for points on which it could distinguish a program essentially identical to Richmond's. If six years of operating a race-neutral program, taking a detailed census of the local business community, following contract dollars into sub-contracts (to the extent the trail was not blocked by prime contractors' refusal to furnish information), all documented in reports and studies and discussed in Commission meetings and workshops, are viewed as the functional equivalent of a single session's consideration of the problem of discrimination, then the Court of Appeals drew an untenable distinction between this case

and *Croson*. If a six year flood of discrimination complaints by federal agencies, constituents, and private organizations, many of which are supported by investigation, constitute an experience indistinguishable from the statement of a city councilman that after practicing law in Richmond he believed that there was discrimination in the local construction industry, then the Court of Appeals drew an untenable distinction. If these are material differences (and petitioners do not contend the contrary; they pretend they do not exist) the Court of Appeals followed *Croson* faithfully.

Petitioners' attack on Hillsborough County's statistical evidence is an attack on any inference drawn from statistics. It ignores *Croson*'s express holding that a *prima facie* case of discrimination may be established by a properly conducted statistical study that shows serious disparities between the percentage of public contract dollars reaching qualified minority businesses and the percentage of such enterprises in the business community. The City of Richmond compared prime contracts awarded to black businesses with black representation in the general population, a comparison the Court said was defective at both ends, since it did not take into account possible subcontracts going to black contractors and assumed, without evidence, that black contractors would be available in proportion to black representation in the general population. Hillsborough County identified the minority and female business community, and it followed the dollars into sub-contracts, despite the prime contractors' attempts to block the inquiry. Its comparison between public contract dollars flowing to minority and female businesses and the representation of minorities and

women in the entire business community showed continuing gross disparities, especially in the case of black contractors. That is precisely the nature and quality of statistical evidence this Court said in *Croson* would establish a *prima facie* case of discrimination sufficient to justify race-conscious remedial legislation.

It should be pointed out that the opinion of the Court of Appeals does not detail the entire body of statistical information compiled by the County between 1978 and 1984. Most of this is summarized in its statement that the County concluded that minorities "were significantly under-represented in such awards [on County contracts]" throughout that period. 908 F.2d at 914. The opinion refers to data for three weeks in July 1982, which had been broken out in the original compilation for reasons that do not appear. The three-year figures were actually worse than the 6.3% minority/female representation in July 1982. Overall minority and female participation was less than 4%, a 4-1 disparity for Hispanic and female contractors and a 60-1 disparity for black contractors. Although the disparities observed for Hispanics and women might arguably be less than gross, "outrageous" would more aptly describe the 60-1 disparity found between the representation of blacks in the contracting business and the amount of County work they actually got. Petitioners' carpings about the "capacity" of white versus black businesses are inconsequential against a backdrop of racial exclusion of this magnitude.

Petitioners' suggestion that the County's information is unreliable unless it incorporates some form of "capacity" evaluations of minority and non-minority firms at least implicitly conflicts with *Croson*'s reference to *Ohio*

Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983) as an example of a properly conducted statistical study. The data complied in *Ohio Contractors* incorporated no evaluations of relative capacity and did not reveal disparities as gross as those Hillsborough County found.

Furthermore, a "capacity" evaluation such as petitioners demand would be largely irrelevant. The question is not whether a white business could bid 100 jobs at once; it is whether minority businesses can bid for a given job. That minority businesses tend to be smaller than white businesses simply means that they reach capacity at a lower level, and therefore are more often unable to bid on new jobs while completing current contracts. A reduction in minority bidders translates, in Hillsborough County's program, into a reduction in the minority participation needed to satisfy project goals. This may in part account for the reduced minority/female participation in bids found responsive (15.6%) from the participation projected in the project goals (19.6%).

Petitioners suggest that the uncertainty and expense of having to rebut a *prima facie* case will deter the bringing of actions such as this, asking melodramatically how they could rebut a *prima facie* case based on statistical disparities. A *prima facie* case of discrimination is like a *prima facie* case of anything else – evidence of circumstances from which the decision-making authority may infer the existence of a fact not directly proved, if the circumstances are not adequately explained in a way that makes the inference untenable. In the context of Hillsborough County's legislative finding of past and present discrimination in the local construction industry, it means

that the Board of County Commissioners could rely on the evidence of continuing gross under-representation of minorities as showing discrimination, unless the evidence available to it suggested the existence of a reason other than discrimination that would convincingly account for the disparity. The issue tendered by petitioners is not presented by this record.

2. The Court of Appeals did not accept racial balancing as a proper legislative purpose.

Petitioners attempt to impeach the express declaration by the Hillsborough County Commission that it found discrimination in the local contracting industry, and its statement of purpose to correct that discrimination. They assert that the "real" reason was not because there was any discrimination but because the County decided simply to distribute the benefits of public contracts on a racial quota basis.

Petitioners falsely state at page 15 that "[t]he expressed goal of Hillsborough's MBE program was to ' . . . [establish a] program of equitable distribution [which] is based on the percentage of minorities constituting the minority population of Hillsborough County . . . '." The excerpted quotation is taken from a 1983 memorandum to the County Administrator from Robert Saunders, Equal Opportunity Director, reporting on the status of the voluntary program. Mr. Saunders recommended that a race-conscious program be established which would use population distribution as the basis for

comparison. This request, however, was rejected.[6] The program does not rely on population and never has. The 1984 goals were based on the representation of minorities and women in the pool of available contractors. Every component of the goal was within one percentage point of the representation of each group among contractors generally. Goals are set for each project, based not on population but on the demonstrated availability of minority/female subcontractors in the particular trades needed for the work. Petitioners' representation of a recommendation that the County rejected as a statement of its "expressed goal" is inconsistent with their obligations to the Court.

Petitioners claim support for their view of the purpose of the law in an extended footnote that collects every statement by anyone in County government that includes the word "equity" or "equitable". Respondents fail to perceive how the expression of a desire that governmental benefits be equitably distributed taints a finding of discrimination or suggests a purpose other than its elimination. An "equitable share" of public contract monies to black contractors is the share one would expect them to be getting without discrimination. The existence of long-continued discrimination prevents us from knowing precisely what that should be, but it is obviously

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[6] This issue was discussed at length at a Commission workshop in April 1984. The County Attorney advised the Board then and on other occasions that the program would have to use availability, not population, as a criterion. Availability was the express criterion of the resolution as enacted. (Pl. Ex. 21, Deft. Ex. 27).

much greater than 0.1% for a group of contractors constituting 6% of the total. Respondents see no equity in this. Nor is it evidence of a hidden agenda to impose racial quotas that the County uses minority representation among contractors as a lodestar in estimating what they should have gotten without discrimination.

The Court of Appeals discussed the County's purposes in adopting the program, finding "that the County MBE law was not the result of some vague government desire to right past wrongs. The law resulted from prolonged studies of the local construction industry that indicated a continuing pattern of discrimination." 908 F.2d 908, 915. Nothing in the record presents any legitimate issue regarding its purpose.

3. *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L.Ed.2d 733 (1989) has no bearing on a local government's demonstration of need for race-conscious measures.

Petitioners claim that *Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. ___, 104 L.Ed.2d 733 (1989) requires that a state or local government seeking to support a race-conscious public contract program identify with particularity the discriminatory practices resulting in the under-representation of minorities and women it finds to exist. Hillsborough County, they say, has never identified "even *one* discriminatory practice at which this program is aimed". (Petition at 17, emphasis in original). Petitioners' argument both misreads *Croson* and *Wards Cove* and misstates the record. Respondents identified many discriminatory practices, several of which were referred to by the Court of Appeals, that the County

found to exist and against which the program was aimed. These included bid shopping, discriminatory pricing by suppliers, the use of minority front enterprises by prime contractors, and others.

Moreover, petitioners' attempt to bring *Wards Cove* to bear in this case is defeated by its own internal illogic and by its failure to correctly represent the holding of either *Wards Cove* or *Croson*. *Wards Cove* was a disparate-impact employment discrimination case brought under Title VII of the 1964 Civil Rights Act. Plaintiff contended that the employer, a salmon cannery, maintained racially distinct classes of employees – cannery workers and non-cannery workers. Most cannery workers were employed through a Philippine labor union, which supplied mostly Philippines and other non-whites. Non-cannery employees were predominantly white. Plaintiff contended that several employment practices, not discriminatory in themselves, caused the maintenance and perpetuation of distinct racial lines between the two groups.[7] This Court held that plaintiff could not make out a *prima facie* statistical case of employment discrimination by comparing the racial composition of cannery workers to that of non-cannery workers, since the class of cannery workers did not fairly represent the pool of available applicants that must be the basis for comparison. The holding of *Wards Cove* on this point parallels *Croson*'s holding about statistical studies. The error in both cases was the failure to

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[7] The practices included nepotism, a re-hire preference, a lack of objective hiring criteria, separate hiring channels (i.e., the labor union for cannery employees), not promoting from within, and not posting notices for non-cannery jobs at the cannery.

compare minority representation in the "favored" group with minority representation in the group from which one could expect those in the "favored" class to be selected, i.e., the pool of available applicants. Richmond assumed that because minorities constituted 50% of the city's population, minority representation in the pool of available applicants for public contract work would be the same. The Hillsborough County program does not suffer from this or any other defect in its statistical underpinnings.

This Court also held in *Wards Cove* that if, on remand, plaintiffs showed a statistical disparity between the number of non-whites in the at-issue positions and their representation in the pool of available applicants, they must also show a causal link between the facially non-discriminatory practices they challenged and the under-representation of non-whites. It is from this holding that petitioners would draw a rule that a state or local government seeking to justify its use of race-conscious remedies must show, in addition to a pervasive pattern of discrimination, specific discriminatory practices engaged in by members of the white business community.

Wards Cove dealt not with identification but with causation. The burden has always been on one who claims that a facially neutral employment practice is discriminatory in its effects to present evidence from which it can be concluded that the practice has "a significantly disparate impact on employment opportunities for whites and non-whites". 490 U.S. at ___, 104 L.Ed.2d at 751.[8] We

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[8] This is usually accomplished by showing that the practice screens out minorities (or females) by directly or indirectly

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deal here not with facially neutral employment practices but with a long-standing pattern of systematic exclusion of minority businesses. Are petitioners suggesting that we must present evidence that shopping minority contractors' bids to white contractors reduces opportunities for minority contractors to participate in public contracts?

It is petitioners who make incorrect comparisons, by attempting to derive principles from a disparate-impact employment case to apply to the analysis of a legislative finding of county-wide discrimination in the construction industry. To the extent that analogies may properly be drawn from employment cases, the more apt comparison is to a disparate-treatment case, where plaintiff shows that the employer has never hired a black, although blacks are a substantial fraction of the pool of potential employees. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Hillsborough County found that its minority business community had encountered precisely that situation in the competition for sub-contracts on hundreds of County projects throughout the life of the 1978 program. Disparate-impact analysis might have an analogue where minority businesses were under-represented in a limited group of trades, but it has nothing to do with their exclusion from the entire market. Six years of observing the systematic under-representation of Hispanic and female contractors,

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requiring a characteristic possessed disproportionately by non-minorities (or men). See *Dothard v. Rollinson*, 433 U.S. 321 (1977).

and the systematic exclusion of black contractors, was enough to justify the County's conclusion that discrimination was at work.

4. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. ___, 111 L.Ed.2d 445 (1990) has no bearing on the evaluation of a state or local race-conscious program, nor did the Court of Appeals rely on it in finding that Hillsborough County had made an adequate showing of need.

Petitioners repeat their assertion in Point II that the Hillsborough County minority business program was enacted not to remedy discrimination but to accomplish some broader societal goal. They claim that the Court of Appeals implicitly held that a state or local race-conscious public contract program may be adopted for purposes other than remedying discrimination, stating that "only if . . . a purpose other than remediation is permissible does the Court of Appeals' decision make sense". (Petition at 19).[9] The Court of Appeals is supposed to have got this idea from *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. ___, 111 L.Ed.2d 445 (1990), which upheld minority preferences applied by the FCC in evaluating applicants for broadcast licenses. *Metro Broadcasting* is not cited by the Court of Appeals, nor is

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[9] As we showed in Point I, the Court of Appeals' decision makes sense on its own terms, i.e., that Hillsborough County conducted sufficient inquiry before adopting a race-conscious program to properly satisfy itself that discrimination was indeed being practiced.

there anything in its opinion that even hints of a belief that any purpose but remediation can or should be used to justify a race-conscious public contracts program.

Petitioners cite *Harrison & Burrowes v. Cuomo*, ___ F.Supp. ___ (N.D. N.Y. 1990) and *H. K. Porter Co. v. Metropolitan Dade County*, unreported (S.D. Fla. 1990)[10] as examples of confusion generated in the lower courts by *Metro Broadcasting* about the proper standard of review. The only confusion is in the Petition. *Harrison & Burrowes* considered two New York minority business programs that applied respectively to state and federally-funded contracts. The Court found that the law governing state projects did not have an adequate legislative predicate under *Croson* and issued a preliminary injunction against its application. It denied a preliminary injunction as to the federal program, citing *Metro Broadcasting* as a basis for the distinction in the standard of review to be applied. *H. K. Porter* considered a federal program. In rejecting plaintiff's claim that *Croson* standards applied, the Court cited *Metro Broadcasting* (and *Croson* itself) to show that a less restrictive standard applied to federal programs.

We cannot understand why *Metro Broadcasting* might confuse anyone about the standard of review applicable to a state or local law. The *Croson* plurality held that Congress may adopt race-conscious programs in circumstances where states and localities may not. The lower courts are aware that different standards of review apply

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[10] Because the *H. K. Porter* opinion has not been published, it is reproduced in the Appendix.

to state and federal laws.[11] Federal programs may be more easily justified than state and local programs; how much more will be established in cases dealing with federal, not state, programs. *Metro Broadcasting* has no implications for the outcome of this case, and petitioners' suggestion that the Court of Appeals thought it did is specious. The issue framed by petitioners is not presented by this record.

5. Hillsborough County considered and implemented race-neutral measures before resorting to a race-conscious program.

Petitioners claim that the Court of Appeals falsified its opinion in stating that Hillsborough County had tried race-neutral measures and found them ineffective,[12] that the Court decided the case as it did because it believes that there should be no need to consider race-neutral remedies. We have already discussed, in the Statement of the Case, petitioners' abuse of the Record in asserting that the 1978 program was never funded or implemented. The program was made a part of the record in the District Court, and there was substantial testimony about its operations. Petitioners have attempted to convert staff complaints that the program was not succeeding into

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[11] The Court of Appeals was aware of it in this case. One issue respondents raised was that the injunction, even if valid as to locally funded contracts, should be modified to permit the County to fulfill its obligations under federal programs. The Court of Appeals noted that issue but did not reach it.

[12] "This is simply not so and reflects the Court of Appeals' cavalier approach to judicial review of race-conscious programs." (Petition at 21).

proof that there was no program. The record does not present the issue they tender.

6. This record presents no issue regarding the continuing need for a race-conscious program in Hillsborough County, when such issue was not referred to by the Court of Appeals or presented to it by the parties.

Petitioners finally assert that, even if the program was justified in 1984, it has achieved its purpose and the Court of Appeals erred in allowing it to continue, since minority participation in 1988-1989 was 19.6%, greater than the percentage of minority contractors. This argument is grounded on falsification.

As shown in the Statement of the Case, the 19.6% figure relied on by petitioners is inaccurate. Minority and female participation in contracts awarded in fiscal year 1988-1989 was 15.6%; the aggregate of goals set on 1988-1989 projects before advertisement was 19.6%. Counsel for petitioners heard the pertinent testimony; there was no dispute about the figures in the briefs or argument below. Petitioners have relied on an inadvertent misstatement by the Court of Appeals in order to make a more melodramatic argument than the true data would support.

Whether the program is still needed is a question that has never been presented to the courts below. The focus of judicial attention has always been its initial justification. We hope for a time when this program can be dismantled, but the record clearly shows that this is not the time, even were the issue presented. Besides using

incorrect statistics for minority/female participation, petitioners ignore what happened when the constraints of the program ceased. Hillsborough County experienced the same immediate and precipitous drop in minority participation after the entry of the injunction on October 16, 1989 that the City of Tampa experienced after it suspended its program on March 17, 1989. As with Tampa, bids submitted to Hillsborough County after the injunction totally excluded black contractors, as they had done before 1984, and significantly under-represented other minority contractors.[13] For petitioners to assert that the program is no longer needed, when their own behavior after the injunction demonstrates its continuing necessity, is farcical. The record does not present this issue.

CONCLUSION

The record does not support petitioners' claim that the Court of Appeals is unwilling or unable to apply the standards of *Croson* impartially. Respondents are confident that, were this Court to grant the petition in the belief that the case actually raises a question about the proper application of *Croson*, it would affirm after full

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[13] The Court of Appeals referred in a footnote to Hillsborough County's post-injunction experience, commenting that it "would clearly point to discrimination". 908 F.2d at 915, n. 10. The note states that the record contains no evidence about it. In fact, an affidavit containing the information was attached to the Motion for Stay of Injunction filed in the District Court and became a part of the Record on Appeal from the permanent injunction. It was also attached to the Motion to Stay Injunction filed with the Court of Appeals.

consideration. Respondents believe that the correctness of the decision of the Court of Appeals is so manifest that they feel obliged to note that, under Supreme Court Rule 16.1, this Court's options include summary disposition on the merits.

The issues raised by affirmative action programs have deeply divided this country. Questions of what kind of legislative record will support a race-conscious remedial measure, and what kinds of programs are sufficiently tailored to their purpose, will occupy the courts for years; the business of divining what this Court "really meant" in *Croson* threatens to become a cottage industry. Respondents believe that some of the more unhealthy speculation would end, should the Court summarily affirm the judgment of the Court of Appeals. *Croson* provides a vivid example of a minority business program that was enacted without sufficient consideration, and operated in too draconian a manner, to meet Fourteenth Amendment standards. This case presents an equally vivid example of a program whose legislative foundation is comprehensive and reliable, and whose provisions are well tailored to its goal. Should the Court officially acknowledge that, the lower courts could turn to their task in confidence that the stream in which they row has banks on either side. Respondents respectfully request that the Petition for a Writ of Certiorari be denied, or in the alternative that the

Court enter its order summarily affirming the judgment below.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2766-CIV-DAVIS

H.K. PORTER CO., INC.,

Plaintiff,

v.

METROPOLITAN DADE COUNTY, et al.,

Defendants.

_____/

ORDER
ON REMAND
(Filed
July 16, 1990)

THIS MATTER is before the Court on Remand from the United States Court of appeals for the Eleventh Circuit.

FACTS

This dispute arises out of the award of a federal construction contract ("contract Y-621") for the electrified third rail of Miami's metropolitan transit system.[1] Defendant Metropolitan Dade County ("MDC") awarded the contract to the second lowest bidder, Transit Products, Inc., ("Transit") pursuant to an affirmative action plan.

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[1] The facts of this cause are set on [sic] in detail in *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 650 F.2d 778 (5th Cir. Unit B 1981). The Eleventh Circuit has adopted as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Plaintiff, the low bidder, contends that the affirmative action plan is unconstitutional.

On May 8, 1986, the Court Granted Defendants' Motion for Summary Judgment and Denied Plaintiff's Motion for Summary Judgment. The Court found that MDC's bidding procedure for contract Y-621 was not unconstitutional and that MDC did not act arbitrarily or capriciously in denying the Metrorail contract to Plaintiff. In so ruling, the Court noted that "[i]n light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress had the power to remedy the effects of past discrimination. DADE COUNTY'S modest 5% minority business enterprise goal – not quota – for the Metrorail contract was a valid implementation of Congressional policy."

On Appeal, the Eleventh Circuit affirmed this Court's summary judgment award to MDC, holding that (1) the Urban Mass Transit Administration ("UMTA") had the authority, pursuant to a clear and strong Congressional mandate, to promulgate the Minority Business Enterprises ("MBE") program relative to contract Y-621; (2) MDC's use of a 5% MBE goal in contract Y-621 was not unconstitutional; and (3) MDC did not act arbitrarily and capriciously in denying the award of the contract to Plaintiff.[2]

On March 9, 1989, the United States Supreme Court granted Plaintiff's petition for writ of certiorari to the

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[2] *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), *vacated*, 109 S. Ct. 1333 (1989).

United States Court of Appeals for the Eleventh Circuit, vacated the Eleventh Circuit's judgment and remanded this cause "to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *City of Richmond v. J.A. Croson Company*, 488 U.S. ___, 109 S. Ct. 706, ___, L.Ed.2d ___ (1989)."[3] On April 13, 1989, the Eleventh Circuit remanded the above-styled cause to this Court "for such proceedings as the District Court deems necessary in view of the Order of the Supreme Court of the United States of March 9, 1989."

In *Richmond*, the United States Supreme Court "confront[ed] once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society."[4] The Richmond City Council adopted a minority set-aside program which "required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs)."[5] In holding that the city of Richmond did not demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race, the Court averred that:

> [w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination,

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[3] 109 S. Ct. 1333.

[4] 109 S. Ct. 706, 712 (1989).

[5] *Id.* at 712-13.

> they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity."[6]

The Court also found that the Richmond set-aside program was not narrowly tailored to remedy the effects of prior discrimination.[7]

On remand, Plaintiff moves this Court to reconsider its May 8, 1986, Order Granting Defendants' Motion for Final Summary Judgment in light of *Richmond*. Plaintiff's reliance on *Richmond* is misplaced, however, because that case does not address the situation where Congress mandates state and local public bodies to implement minority business goals as a condition to receiving federal financial assistance for the construction of highway and mass transportation projects. This Court and the Eleventh Circuit found *Fullilove v. Klutznick*,[8] controlling. In *Fullilove*, the United States Supreme Court held that a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors did not violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.[9]

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[6] *Id.* at 727.

[7] *Id.* at 728-29.

[8] 448 U.S. 448 (1980).

[9] *Id.* The federally funded project and MBE provision in *Fullilove* are similar to those at issue in the instant case.

Recognizing the significant differences between the set-aside program upheld in *Fullilove* and that at issue in *Richmond*, the *Richmond* Court specifically noted that "[in *Fullilove*], Congress was exercising its power under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patters of discrimination."[10]

On Appeal, the Eleventh circuit indicated that:

> [t]he record does not suggest that MDC conducted such detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in contract Y-621. We must concede that we are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621.[11]

Consequently, on remand, the Court conducted a hearing on September 11, 1989, to allow MDC to introduce evidence on its determination of the 5% MBE goal for contract Y-621 and to withdraw certain admissions.

In considering the Eleventh Circuit's remand of this action, this Court is particularly mindful of the United

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[10] *Richmond*, 109 S. Ct. at 726-27. As noted in Part II of Justice O'Connor's *Richmond* opinion, in which Chief Justice Rehnquist and Justice White joined, the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here." *Id.* at 720.

[11] *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 825 F.2d 324, 332 (11th Cir. 1987), *vacated*, 109 S. Ct. 1333 (1989).

States Supreme Court's recent affirmation of the principles annunciated in *Fullilove*. In *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 58 U.S.L.W. 5053 (U.S. June 27, 1990), the Court addressed "whether certain minority preference policies of the Federal Communications Commission violate the equal protection component of the Fifth Amendment."[12] In finding the commission's minority ownership policies constitutional, the Court averred the following:

> We hold that benign race – conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.
>
> Our decision last Term in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress. As JUSTICE KENNEDY noted, the question of congressional action was not before the Court, *id.*, at 518 (opinion concurring in part and concurring in judgment), and so Croson cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and

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[12] *Metro Broadcasting*, 58 U.S.L.W. at 5054.

ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.[13]

Based on the foregoing and after reviewing the record and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Reconsideration is DENIED and this Court's prior judgment is REAFFIRMED.

DONE AND ORDERED IN Chambers at Miami, Florida, this 13th day of July, 1990.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

copies furnished to
counsel of record

tdf

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[13] *Id.* at 5057.

Administrative Order 88-3 (Pl. Ex. 2)

11.2 The County shall consider the following criteria in determining good faith efforts:

(a) Attendance at the pre-bid conference, if held;

(b) Whether and when the contractor provided written notice, by mail or hand delivery to all certified MBE/DMBE/DWBE that perform the type of work to be subcontracted and advising the MBE/DMBE/DWBE:

(1) of the specific work the contractor intends to subcontract;

(2) that their interest in the contract is being solicited; and,

(3) how to obtain information for the review and inspection of contract plans and specifications;

(c) Whether the contractor selected economically feasible portions of work to be performed by MBE/DMBE/DWBE, including, where appropriate, breaking contracts of combining elements of work into economically feasible units. (The ability of the contractor to perform the work with its own work force will not in itself excuse a contractor from making positive efforts to meet contract goals);

(d) Whether the contractor submitted all quotations received from MBE/DMBE/DWBEs, and for those quotations not accepted, an explanation of why the MBE/DMBE/DWBE will not be used during the course of the contract (Receipt of a lower quotation from a non-MBE/DMBE/DWBE will not in itself excuse a contractor's failure to meet contract goals);

(e) Whether the contractor provided interested MBE/DMBE/DWBE assistance in reviewing the contract plans and specifications;

(f) Whether the contractor assisted interested MBE/DMBE/DWBE firms in obtaining required bonding, lines of credit or insurance;

(g) Whether the contractor's efforts were merely pro forma and, given all relevant circumstances, could not reasonably be expected to provide sufficient MBE/DMBE/DWBE participation to meet the goals;

(h) Whether the contractor has utilized MBE/DMBE/DWBE subcontractors on other County contracts within the past six months;

This list is not intended to be exclusive or exhaustive and the County will look not only at the different kinds of efforts that the contractor has made, but also the quality, quantity and intensity of those efforts.